TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 350

EDUCATIONAL FILMS CORPORATION OF AMERICA, APPELLANT,

vs.

HAMILTON WARD, ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND THOMAS M. LYNCH ET AL., ETC.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

FILED AUGUST 14, 1930

(35,272)

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[fols. 1-3] Citation, in usual form, showing service on Hamilton Ward, filed July 25, 1930, omitted in printing.

[fol. 4]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. E 52-72

EDUCATIONAL FILMS CORPORATION OF AMERICA, Plaintiff,

against

HAMILTON WARD, Attorney General of the State of New York, and Thomas M. Lynch, John J. Merrill, and Mark Graves, Comprising the New York State Tax Commission, defendants

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby agreed and stipulated, in lieu of præcipes, that the following portions of the record of said District Court in the above matter are to be included in the transcript:

Order to Show Cause, containing temporary restraining order.

Bill of Complaint.

Schedule "A" (attached to bill of complaint).

Schedule "B" (attached to bill of complaint).

Affidavit of Dario L. Faralla.

Exhibit "C" (attached to affidavit).

Affidavit of Roger Hinds.

Order amending Bill of Complaint, dated February 21, 1930.

Stipulation Amending Bill of Complaint.

Order amending Bill of Complaint, dated March 25, 1930.

Opinion.

Decree denying injunction and dismissing bill.

Petition for Appeal (and annexed order allowing appeal).

Assignment of Errors.
Dated New York City, August 4, 1930.
Roger Hinds, Solicitor for Plaintiff. Hamilton Ward, Attorney General, Solictor for Defendants.

[fol. 5] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER TO SHOW CAUSE

This day came Educational Films Corporation of America, by Roger Hinds, its solicitor, and moved the Court for a temporary restraining order in accordance with the prayer of its bill of complaint filed on the 18th day of February, 1930, restraining and enjoining the defendants therein named and each of them, and their successors in office and agents, from proceeding further with the assessment, levy and collection of a certain threatened tax so assessed, based on and measured by income from copyrights of the United States, and in support of its said motion plaintiff tendered to the Court the affidavit of Dario L. Faralla, verified the 15th day of February, 1930, and the affidavit of Roger Hinds, verified the 18th day of February, 1930, and the aforesaid bill of complaint, verified the [fol. 6] 15th day of February, 1930, and it appearing to the Court that the said threatened tax so complained of in the bill of complaint is payable on or before the 28th day of February, 1930, under severe penalties and under threat of levy and distress, despite plaintiff's protest that said tax, or any tax based on or measured by its income derived from copyrights of the United States is violative of its rights under the United States Constitution, and that great and irreparable injury would in the event of such collection, levy and distress result therefrom to the plaintiff for which plaintiff would have no adequate remedy or redress at law, now upon motion of the aforesaid solicitor for the plaintiff, it is

Ordered and decreed that the defendants Thomas M. Lynch, John J. Merrill and Mark Graves, comprising the New York State Tax Commission, and Hamilton Ward,

Attorney General of the State of New York, be and they are hereby severally enjoined and restrained until the further order of the Court from proceeding further with the assessment, levy and collection of said threatened tax based on and measured as aforesaid by plaintiff's income from copyrights of the United States, and from making any distraint or levy with respect to such tax upon the property of the plaintiff and or exacting any penalties for the nonpayment thereof, upon filing undertaking in the sum of $8,000 conditioned on the payment of said taxes and costs if it be finally determined herein that plaintiff is not entitled to said injunction; and it is

Further ordered that plaintiff's motion for an injunction continuing said restraining order during the pendency of [fol. 7] this action be set for the 8th day of March, 1930, at 10:30 o'clock in the forenoon in Room 235 in the Old Post Office Building, New York City, and I hereby call to my assistance at the hearing of said motion, the Honorable Harrie B. Chase, a Circuit Judge of this Circuit, and the Honorable John W. Woolsey, a District Judge of this District, and defendants are hereby required to show cause at said hearing why said temporary order should not be continued and an injunction to the aforesaid effect issued restraining defendants from the aforesaid acts during the pendency of this action and why such other and further relief as may be just in the premises should ont be granted; and it is

Further ordered that a copy of this order and of the aforesaid bill of complaint and affidavits be served upon the defendants herein and notice thereof given to the Governor of the State of New York not less than five (5) days before the aforesaid date of hearing.

Dated at New York, N. Y., this 21st day of February, 1930.

Wm. Bondy, Judge of the United States District Court for the Southern District of New York.

[fol. 8] IN UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT

To the Honorable Judges of the District Court of the United States in and for the Southern District of New York:

Educational Films Corporation of America, a corporation organized under and by virtue of the laws of the State of New York, brings this suit against Hamilton Ward, Attorney General of the State of New York, a resident and citizen of the State of New York, and a resident of the City of Buffalo in the State of New York, and M. F. Loughman, John J. Merrill and Mark Graves, comprising the New York State Tax Commission, all citizens and residents of the State of New York.

And for its cause of action, plaintiff states:

1. That the plaintiff complains herein as hereinbelow set forth of the infringement or threatened infringement of its [fol. 9] rights by the defendants under the Constitution of the United States, for which there is no adequate remedy at law. That the amount in controversy herein exceeds the sum of $3,000 exclusive of interest and costs.

2. That the plaintiff is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of New York and doing business in the State of New York with its principal place of business in that State in the City, County and Southern District of New York.

3. That the defendant Hamilton Ward is the Attorney General of the State of New York, and is a citizen of the State of New York and a resident of the City of Buffalo, in the Western District of New York.

4. That the defendants, M. F. Loughman, John J. Merrill and Mark Graves, comprise the New York State Tax Commission and are all citizens of the State of New York, and are hereinafter referred to as "the defendant Commissioners".

5. That during the fiscal year ending June 30, 1929, plaintiff was the owner and proprietor of certain copyrights granted by the United States of America upon motion picture films or productions, which copyrights are described by name, registration number and date in the annexed Schedule "A" which is hereby made part of this bill of complaint; and as such owner had the exclusive right to project and exhibit said films or productions and to license the same for projection or exhibition; that during [fol. 10] said fiscal year plaintiff having licensed same to sundry exhibitors for projection and exhibition, received substantial sums from said exhibitors as royalties under said copyrights, to wit, the sum of $162,588.98, which constituted plaintiff's income from said copyrights.

6. That on or about the 11th day of October, 1929, plaintiff, pursuant to Article 9-A, Section 211, of the New York Tax Law, duly executed, verified and filed with the defendant Commissioners its corporate franchise tax return for its fiscal year ending June 30, 1929, copy of which return is hereunto annexed as Exhibit "B" hereby made part of this bill of complaint, wherein plaintiff, as required by said statute, reported its entire net income for its fiscal year ending, June 30, 1929 as shown by its report to the United States Treasury Department, viz: the sum of $231,372.94, and the amount of its total gross income as reported on said Federal income tax return for the above period, viz: $385,163.35, and the several deductions, aggregating $153,790.41 shown thereon, the difference being said net income, as aforesaid, shown by its report to the United States Treasury Department, and wherein plaintiff was required to state whether it claimed that the amount of said net income as thus reported to the United States Treasury Department was inaccurate and inapplicable for purposes of the computation of said New York Franchise Tax, and accordingly stated that said net income reported on said federal tax return was inaccurate and inapplicable and that the amount of net income claimed to be correct was the sum of $68,683.96, being the amount of plaintiff's net income for said period after excluding said income from copyrights from its gross income as aforesaid, viz: $385,[fol. 11] 163.35 gross income (including income from copyrights) less $162,588.98 income from copyrights, less

$153,790.41 deductions as aforesaid, resulting in net income applicable to the computation of said New York franchise tax (after deducting copyright income from gross income) amounting to $68,783.96 as aforesaid.

7. That the defendant commissioners have not disputed that the facts respecting plaintiff's gross income and the deductions therefrom as aforesaid for said fiscal year were as thus stated by plaintiff in its said return, as was indeed the fact, nor have they disputed that if said royalties were to be excluded (as was done in plaintiff's return) plaintiff's net income for said fiscal year would be the sum of $68,783.96 as aforesaid.

8. That the amount of plaintiff's franchise tax for said fiscal year measured by said net income ($68,783.96) and computed in accordance with the said statute is 4½% of said amount, or $3,095.28, which sum plaintiff has duly paid to said State Tax Commission without prejudice.

9. That the defendant Commissioners have, however, refused to allow plaintiff to exclude from its income for said fiscal year the royalties which it received as aforesaid from United States copyrights and have served upon plaintiff a notice of assessment, pursuant to Section 219-B of said Tax Law, in which they disallow plaintiff's claim that said royalties should be excluded, and the defendant Commissions have (as set forth in said notice) as the result of including, in the computation of plaintiff's net income, said income from copyrights in plaintiff's gross income, ac- [fol. 12] cordingly assessed upon plaintiff a tax of $10,411.79, which is $7,316.51 in excess of the amount of said tax computed after excluding said income from copyrights from plaintiff's gross income as aforesaid.

10. That in so assessing said tax upon plaintiff, measured by income including income from copyrights, defendant Commissioners have done as required by said statute, being Section 208, Subdivision 3, of the New York Tax Law.

11. That said statute in so far as it levies or attempts or purports to levy or assess a tax measured by income including income from copyrights is unconstitutional being in violation of Article I, Section 8 of the Constitution of the United States, and being in effect a tax by one of the

several states upon an instrumentality of the United States or the income therefrom.

12. That in said return (Exhibit "B") plaintiff reported its income from said copyrights during said fiscal year, but asserted and claimed that they should be excluded from plaintiff's income in measuring said tax, and in so doing expressly asserted and based its said claim upon its right under the Constitution of the United States not to be subjected to any tax on, or measured by said copyrights or any income therefrom, which claim has been disallowed and overruled, and right denied, by defendant Commissioners.

13. That despite the aforesaid assertion by plaintiff of its constitutional right the defendant Commissioners have threatened in and by said notice of assessment and otherwise to proceed forthwith to collect sum of $7,316.51 (being [fol. 13] the amount of tax set forth in said notice of assessment less the amount heretofore paid by plaintiff and admitted to be due) by execution or warrant of distress upon plaintiff's property unless plaintiff shall pay said tax within 30 days from the date of said notice, viz.: on or before February 28, 1930, and furthermore said tax, unless paid by plaintiff, will thereupon become a lien on plaintiff's real property in the State of New York and plaintiff become liable under said statute to penal charges at the rate of 10% plus 1% for each month that said tax shall remain unpaid.

14. That further application to said State Tax Commission by plaintiff for the revision of said assessment would be useless, because said State Tax Commission after being fully apprised in plaintiff's said return and otherwise of the fact, verified by plaintiff's treasurer under oath, that plaintiff's gross income for said fiscal period included income from copyrights to the amount aforesaid and that plaintiff asserts its right under the United States Constitution to have said copyright income excluded from its income in computing said tax, has nevertheless refused to exclude said copyright income in the computation of said tax and has rejected and ignored plaintiff's claim based on its constitutional rights, and because such application to the State Tax Commission, even if plaintiff should make it, would not, under said statute and the practice and regula-

tions of the defendants, act as a stay of the payment of said tax.

15. Upon information and belief, that if plaintiff shall voluntarily or under duress and protest pay said tax it will [fol. 14] be without adequate remedy at law under the procedure provided by said statute for the revision and review of said assessment because said statute fails to provide for the payment to the taxpayer of interest even though it be held that said assessment was not lawfully paid and that said tax was not lawfully levied and collected, and because under the procedure as provided by said statute as applied in actual practice, a long period of time would necessarily be consumed in seeking and obtaining the review and revision of said assessment by the defendant Commissioners and by the Appellate Division of the Supreme Court, Third Department, on writ of certiorari, and thereafter by the Court of Appeals, for which period no interest could be collected, and because, moreover, the said statute does not with legal certainty as a matter of right entitle plaintiff to the actual refund of the amount of said tax even if it should be finally determined under the procedure provided by said statute that the same was unlawfully and unconstitutionally assessed, levied and collected, but provides merely that if it shall appear as a result of such proceedings that the taxpayer shall have paid an excessive tax it shall be entitled to credit for the amount thereof upon the books of the Tax Commission, or the amount of such credit, without interest, may, at the direction of the State Tax Commission, be refunded to such taxpayer out of any revenues received to the credit of the State Comptroller, and, upon information and belief, it has not been judicially determined by the courts of New York State that taxpayers, under said provision, are entitled to such refund as a matter of right; and for the further reason that under said state procedure it is a prerequisite of obtaining from the courts even such [fol. 15] inadequate relief as is available thereunder that the tax first be paid, and thereafter a hearing granted to the plaintiff taxpayer by said State Tax Commission, and that a determination be made by the latter after such hearing, without, however, any provision of statute or regulation specifying the time within which said State Tax Com-

mission is required either to grant a hearing to the plaintiff taxpayer or to make its determination of the taxpayer's application for revision, and in actual practice said State Tax Commission has unreasonably and indefinitely deferred the dates of such hearings and its determination of similar applications by taxpayers, and continues to do so, and makes a practice of announcing to taxpayers that hearings on their applications cannot be reached in the near future, without any means afforded by the statutes and procedure of New York State whereby the complaining taxpayers, including plaintiff herein, can as a matter of right obtain within any definite or reasonably expected period such hearings or access to, and relief from, the courts of the State of New York; that, moreover, upon information and belief, the defendants have formed and announced a fixed purpose not to allow, but on the contrary to reject and disallow, any and all claims by corporate taxpayers that income from copyrights, patents, federal bonds or other federal instrumentalities may not (under the federal constitution) be included in the measure of the franchise tax and that they will continue to adhere to said purpose and practice of including, and refusing to exclude, such income in computing such taxes unless and until it be determined by the courts that the constitutional rights of corporate taxpayers are thereby violated.

[fol. 16] 16. Upon information and belief that even the uncertain, unsatisfactory, indefinitely delayed, and inadequate remedy at law which might be available to the plaintiff in the courts of the State of New York does not exist in the Courts of the United States, and plaintiff has no remedy at law whatsoever, either adequate or inadequate, in the federal courts, for the reason that the statutes of the State of New York do not provide for any suit which plaintiff or any other taxpaying corporation might bring to recover back a tax illegally paid, but only the remedy of a writ of certiorari out of the Appellate Division of the Supreme Court, Third Department; that furthermore even if the State Tax Commission can be compelled by writ of mandamus out of said state court to grant a hearing to a taxpayer and make its determination of the taxpayer's ap-

plication for revision, within a reasonable time, the existence of that remedy, even in the state courts, is at best uncertain and doubtful under the decisions of the state courts, and does not exist at all in the federal courts.

17. That plaintiff therefore has no adequate remedy at law in the premises and for that reason invokes the aid of this Court of Equity to the end that its said rights under the Constitution of the United States may be protected and enforced.

18. That the defendant Hamilton Ward, as Attorney General of the State of New York is made party defendant herein pursuant to Section 380 of the Code of Laws of the United States (Section 266 of the Judicial Code).

Wherefore Plaintiff prays that the final decree of this Court be made forever enjoining the defendants and their [fol. 17] successors in office and agents from proceeding further with the assessment, levy and collection of said threatened tax so assessed, measured as aforesaid by including said income from copyrights in plaintiff's gross income, and that they be similarly enjoined during the pendency of this suit.

Roger Hinds, Solicitor for Plaintiff, 165 Broadway, Borough of Manhattan, New York City. Benjamin P. De Witt, Siegfried Hartman, and Roger Hinds, of Counsel.

[fol. 18] *Duly sworn to by Dario L. Faralla. Jurat omitted in printing.*

Educational Films Corporation of America

Copyright

Picture	No.	Date	Issued to	Rentals
Don't Fail	20613	9/29/24	Ed. Films Corp. of America	
Cheer Up	20652	10/13/24	" " " " "	
Desert Blues	20651	"	" " " " "	
No Fooling	20764	11/12/24	" " " " "	
Go Easy	20797	11/24/24	" " " " "	
Empty Heads	20877	12/10/24	" " " " "	
Watch your Pep	20875	"	" " " " "	
Cut Loose	20911	12/16/24	" " " " "	
Have Mercy	20994	1/6/25	" " " " "	
The Mad Rush	21048	1/18/25	" " " " "	
Weak Knees	21200	3/5/25	" " " " "	
Have a Heart	21120	2/9/25	" " " " "	
Welcome Danger	21268	3/10/25	" " " " "	
High Hopes	21281	3/30/25	" " " " "	
Merrymakers	21329	4/6/25	" " " " "	
Inside Out	21372	4/14/25	" " " " "	
Ship Shape	21373	4/21/25	" " " " "	
Rock Bottom	21541	6/8/25	" " " " "	

SCHEDULE "A" to BILL OF COMPLAINT—Continued

Picture	Copyright No.	Date	Issued to	Rentals
Wild Waves	21485	5 21 25	Ed. Films Corp. of America	
Fun's Fun	21678	7 27 25	" " " " "	..
Wake Up	21594	6 26 25	" " " " "	..
Never Fear	21740	8 10 25	" " " " "	..
Permit Me	21831	9 22 25	" " " " "	..
Look Out	21832	"	" " " " "	..
				$1,842 36
In Deep	21985	11 11 25	Ed. Films Corp. of America	
Who's Which	21982	11 9 25	" " " " "	..
Dog Daze	22055	11 27 25	" " " " "	..
Scrambled Eggs	22107	12 11 25	" " " " "	..
Sweet & Pretty	22197	12 29 25	" " " " "	..
Hot Feet	22217	12 30 25	" " " " "	..
Slow Down	22284	1 22 26	" " " " "	..
What's Up	22333	1 27 26	" " " " "	..
Sky Hooks	22448	3 5 26	" " " " "	..
Brotherly Love	22465	3 8 26	" " " " "	..
Be Careful Dearie	22529	1 31 26	" " " " "	..
Keep Trying	22608	3 21 26	" " " " "	..

Don't Stop	22601	3	28	26	"	"	"	"	"
Quick Service	22613	3	19	26	"	"	"	"	"
Scratching Through	22751	4	28	26	"	"	"	"	"
To-Nights the Night	22886	7	8	26	"	"	"	"	"
Somebody's Wrong	22905	7	13	26	"	"	"	"	"
Who's Boss	22953	7	26	26	"	"	"	"	"
What A Life	22906	7	13	26	"	"	"	"	"
Meet My Dog	22953	7	17	26	"	"	"	"	"
Hold 'Er Sheriff	22952	7	26	26	"	"	"	"	"
Hanging Fire	23351	11	17	26	"	"	"	"	"
Squirrel Food	23138	9	22	26	"	"	"	"	"
Don't Miss	23191	10	5	26	"	"	"	"	"
									2,954 91
The Radio Bug	23303	11	8	26	Ed. Film Exchanges, Inc				
Kiss Me Kate	23206	10	11	26	"	"	"	"	
Blumb Goofy	23200		"		"	"	"	"	
Pound Foolish	23226	10	19	26	"	"	"	"	
Hiss Off Day	23304	11	8	26	"	"	"	"	
Bad Breaks	23357	11	19	26	"	"	"	"	
Sweet Baby	23388	12	3	26	"	"	"	"	
Mister Chump	23448	12	20	26	"	"	"	"	
Hot Cookies	23450		"		"	"	"	"	

SCHEDULE "A" TO BILL OF COMPLAINT—Continued

Picture	Copyright No.	Copyright Date	Issued to	Rentals
Dear Season	23525	1/12/27	Ed. Film Exchanges, Inc	
High Spirits	23567	1/18/27	" " " "	
[fol. 20] Quiet Please	23677	1/18/27	" " " "	
Ask Dad	23678	2/16/27	" " " "	
A Perfect Day	23704	2/28/27	" " " "	
First Prize	23908	5/ 2/27	" " " "	
Hot Soup	23797	3/28/27	" " " "	
Hold That Bear	23907	5/ 2/27	" " " "	
Auntie's Ante	23912	"	" " " "	
A Gym Dandy	23938	5/10/27	" " " "	
Careless Hubby	24369	8/20/27	" " " "	
Night Owls	24257	8/ 2/27	" " " "	
The Movie Hound	24130	6/27/27	" " " "	
Brave Cowards	24258	8/ 2/27	" " " "	
Hold Fast	24231	7/27/27	" " " "	
				1,845 95
Fully Equipped	24370	8/27/27	Ed. Film Exchanges, Inc	
Lucky Dog	24371	9/ 7/27	" " " "	
Off Again	24503	10/12/27	" " " "	

Eats for Two	24549	10/24/27	"	"	"	"		
Shooting Wild	24606	11/ 1/27	"	"	"	"		
He Tried to Please	24671	11/18/27	"	"	"	"		
Rest Day	24706	11/28/27	"	"	"	"		
Ain't Nature Grand	24708	11/28/27	"	"	"	"		
It's Me	24729	11/28/27	"	"	"	"		
Fall In	24766	12/20/27	"	"	"	"		
Wedding Slips	24828	1/ 5/28	"	"	"	"		
All Set	24906	1/23/28	"	"	"	"		
Running Ragged	24911	1/26/28	"	"	"	"		
A Mysterious Night	24928	1/31/28	"	"	"	"		
Pretty Baby	24975	2/13/28	"	"	"	"		
Count Me Out	25009	2/28/28	"	"	"	"		
Spring Has Come	25059	3/13/28	"	"	"	"		
Green-Eyed Love	25076	3/19/28	"	"	"	"		
Off Balance	25141	4/ 9/28	"	"	"	"		
Never Too Late	25178	4/23/28	"	"	"	"		
Three Tough Onions	25211	5/ 7/28	"	"	"	"		
Crown Me	25286	5/12/28	"	"	"	"		
Sailor Boy	25322	6/ 4/28	"	"	"	"		
Oh Mama	25376	6/18/28	"	"	"	"		
The Lost Laugh	25410	6/25/28	"	"	"	"		
Hard Work	25463	7/16/28	"	"	"	"		

SCHEDULE "A" TO BILL OF COMPLAINT—Continued

Picture	Copyright No.	Copyright Date	Issued to	Rentals
Never Again	20571	8/24/24	Reel Comedies, Inc	
Stupid But Brave	20695	10/27/24	" " "	
Lovemania	21039	12/28/24	" " "	
Dynamite Doggie	21331	4/ 6/25	" " "	
The Iron Mule	21426	5/ 4/25	" " "	
Curses	21487	5/21/25	" " "	
				970.80
Her Boy Friend	20595	9/23/24	Chadwick Pictures Corp	
Kid Speed	20799	11/24/24	" " "	
The Dome Doctor	21408	4/27/25	Gaumlett & Company	
The Cloudhopper	21575	6/22/25	" "	
				1,705.55
Boneyard Blues	20653	10/14/24	Hurd Productions Inc	
The Hoboken Nightingale	20696	10/27/24	" " "	
The Sawmill Four	21069	12/16/24	" " "	
The Artist's Model	20876	12/10/24	" " "	

Broadcasting	21028	1/14/25	"	"	"			
He Who Gets Socked	21121	2/ 9/25	"	"	"			
Two Cats & A Bird	21227	3/10/25	"	"	"			
The Mellow Quartette	21407	4/27/25	"	"	"			
Monkey Business	21504	5/28/25	"	"	"			
Two Poor Fish	21611	6/29/25	"	"	"			
Prop's Dash for Cash	21629	7/ 6/25	"	"	"			
Bobby Bumps & Company	21834	9/22/25	Ed. Films Exchanges Inc					
Props & The Spirits	21867	10/ 1/25	"	"	"	"		

444 46

[fol. 21] Rough & Ready	20649	10/13/24	Sultan Comedies					
Fast & Furious	20650	10/13/24	"	"				
Poor Butterfly	20765	11/12/24	"	"				
What a Night	20796	11/24/24	White Productions, Inc					
Motor Mad	21221	1/28/25	"	"				
Low Tide	21042	1/19/25	"	"				
Wild Game	20570	9/ 6/24	Sultan Comedies					
Step Lightly	21149	2/14/25	White Productions, Inc					
His High Horse	21148	2/14/25	"	"				
Hello Hollywood	21228	3/10/25	"	"				
Red Pepper	21330	4/ 6/25	"	"				
Wide Awake	21395	4/22/25	"	"				

SCHEDULE "A" TO BILL OF COMPLAINT—Continued

Picture	Copyright No.	Copyright Date	Issued to	Rentals
Fares Please	21519	6/ 1/25	White Productions, Inc.	
Hello Goodbye	21486	5/21/25	" "	
Going Great	21612	6/29/25	" "	
Below Zero	21669	7/23/25	" "	
Hot & Heavy	21833	8/10/25	" "	
Beware	21833	9/22/25	E. F. Ex. Inc	
				1,014.12
Jonah Jones	20612	9/29/24	Lloyd Hamilton Corp	
Crushed	20798	11/24/24	" "	
Hooked	21099	2/ 4/25	" "	
Half a Hero	21226	3/10/25	" "	
King Cotton	21494	5/26/25	" "	
Waiting	21677	7/27/25	" "	
				1,415.26
Oh Teacher	20569	8/31/24	Sultan Comedies	
Dirty Hands	20648	10/13/24	" "	

Goat Getters	21162	2/25/25	White Productions, Inc		
Wildcat Willie	21132	2/12/25	"	"	
Dragon Alley	21447	5/11/25	"	"	
Baby Blues	21595	6/26/25	"	"	
					2,458 10
Jolly Tars	23069	8/31/26	Ed. F. Ex., Inc		
Teacher, Teacher	23271	10/28/26	"	"	
One Sunday Morning	23441	12/14/26	"	"	
Peaceful Oscar	23612	1/30/27	"	"	
Somebody's Fault	23746	3/ 8/27	"	"	
Breezing Along	23910	5/ 2/27	"	"	
Goose Flesh	24074	6/14/27	"	"	
His Better Half	24261	8/ 2/27	"	"	
					7,759 46
Movieland	23368	11/19/26	"	"	
Howdy Duke	23569	1/18/27	"	"	
Drama De Luxe	23679	2/16/27	"	"	
Naughty Boy	23909	5/ 2/27	"	"	
Who's Afraid	24095	6/16/27	"	"	
Monty of the Mounted	24256	8/ 2/27	"	"	
					7,596 39

Picture	Copyright No.	Copyright Date	Copyright Issued to	Rentals
Beauty a la Mud	23118	9/15/26	Christie Film Co., Inc	
Shell Socked	23273	10/28/26	" "	
Wild & Woozy	23474	12/27/26	" "	
Here Comes Precious	23796	3/28/27	" "	
No Sparking	24092	6/16/27	" "	
Meet The Folks	24360	8/ 2/27	" "	
A Dippy Tar	23121	9/15/26	" "	
A Briny Boob	23227	10/19/26	Ed. F. Ex., Inc	
Have Courage	23412	12/ 9/26	Christie Film Co	
Sailor Beware	23682	2/16/27	" "	
Dumb Belles	24398	9/ 8/27	" "	
Wild Wappops	24280	8/10/27	Ed. F. Ex., Inc	
The Daffy Dill	23070	8/31/26	Christie Film Co., Inc	
Uppercuts	23119	9/15/26	" "	
Hold Still	23204	10/11/26	" "	
Dodging Trouble	23305	11/ 8/26	" "	
[fol. 22] Cool Off	23427	12/13/26	" "	
Break Away	23624	1/12/27	" " " "	
Chicken Feathers	23695	2/23/27	" " " "	
Cash & Carry	23735	2/27/27	" " " "	

Queer Ducks	23967	5/16/27	"	"	"	"				
Giddy Gobblers	24244	7/27/27	"	"	"	"				
Wife Shy	23190	10/ 5/26	"	"	"	"				
Hoot Mon	23356	11/19/26	"	"	"	"				
Don't Fire	23449	12/20/26	"	"	"	"				
Duck Out	23639	2/ 8/29	"	"	"	"				
Jail Birdies	24245	7/27/29	"	"	"	"				
Tie That Bull	24093	6/16/27	"	"	"	"				
									2,139	81
My Kid	23371	11/26/26	Ed. Film Ex., Inc.							
Open Spaces	23299	11/ 8/26	"	"	"	"				
Funny Face	23499	1/ 3/27	"	"	"	"				
Grandpa's Boy	23703	2/28/27	"	"	"	"				
Atta Baby	23968	5/16/27	"	"	"	"				
Kid Tricks	24129	6/27/27	"	"	"	"				
									6,712	58
The Vision	22813	6/ 2/26	Romance Productions, Inc							
The Blue Boy	23085	9/ 8/26	"		"		"			
Mona Lisa	23340	11/14/26	"		"		"			
									1,569	86

Picture	Copyright No.	Date	Issued to	Rentals
All Star Freaks	23213	10 12 26	Futter Productions, Inc	
Rare Bits	23215	10 12 26	" " "	
What Nots	23201	10 11 26	" " "	
Then & Nows	23358	11 19 26	" " "	
Nic-Nax	23410	11 9 26	" " "	
Highlights	23563	1 18 27	" " "	
Fiddlesticks	23680	2 16 27	" " "	
Odd Jobs	24115	6 24 27	" " "	
Growing Money	23904	5 2 27	" " "	
Mystic India	4094	6 16 27	" " "	
Pick A Pet	24375	8 27 27	" " "	
Traveling At Home	24259	8 2 27	" " "	
				429 75
Open House	23086	9 8 26	Ed. Film Ex., Inc.	
The Humdinger	23205	10 11 26	" " " "	
Close Shaves	23389	12 3 26	" " " "	
Wedding Yells	23640	2 8 27	" " " "	
The Drawback	23798	3 27 27	" " " "	

Her Husky Hero	24096	6	16	27	"	"	"	"
								5,534 84
Red Hot Rails	23225	10	19	26	Sherwood Wadsworth P., Inc			
Flaming Ice	23224	10	19	26	"		"	"
Missing Links	23137	9	22	26	"		"	"
The Yellow Pirate	23139	10	5	26	"		"	"
Cut Price Glory	23203	10	11	26	"		"	"
The Raging Tide	23302	11	8	26	"		"	"
The Mighty Smithy	23359	11	19	26	"		"	"
Barnum Was Right	23442	12	16	26	"		"	"
Balloon Tired	23409	12	9	26	"		"	"
Why Women Pay	23443	12	16	26	"		"	"
The Peaceful City	23498	1	2	27	"		"	"
Mike Wins A Medal	23566	1	18	27	"		"	"
Soft Soap	23611	1	30	27	"		"	"
The Heavy Date	23642	3	8	27	"		"	"
Hitting The Trail	23694	2	23	27	"		"	"
Local Talent	23744	3	8	27	"		"	"
Ruling The Rooster	23800	3	27	27	"		"	"
The Prince of Whales	23905	5	2	27	"		"	"
Racing Fever	23906	5	2	27	"		"	"
North of Nowhere	23965	5	16	27	"		"	"
								1,296 64

SCHEDULE "A" TO BILL OF COMPLAINT—Continued

Picture	Copyright No.	Copyright Date	Issued to	Rentals
[fol. 23] Falling Water Valley	3570	9 21 26	Robert C. Bruce	
Typical Tropical Iky	3635	10 27 26	Ed. Film Exchanges, Inc	
The River Road	3686	12 9 26	Robert C. Bruce	
Hula Hula	3687	12 13 26	" " "	
Sunbeams	3688	12 13 26	" " "	
Steamer Day	3754	1 24 27	" " "	
The Joys of Camping	4010	5 10 27	" " "	
Hawaii from the Car Window	3855	3 20 27	" " "	
Buried Treasure	4011	5 10 27	Edo. Prod. Unit Inc	
Gray Days	4012	5 10 27	" " " "	
Tenants of Marble Canyon	4202	8 10 27	" " " "	
River of Suds	4190	8 2 27	" " " "	
				$780 06
The Jelly Fish	23120	9 15 26	Ed. Film Exchanges Inc	
Pink Elephants	23272	10 27 26	" " " "	
Midnight Follies	23300	11 8 26	" " " "	
Flaming Romance	23334	11 14 26	" " " "	
Much Mystery	23411	12 9 26	" " " "	

High Seal Blues	23473	12/27/26	"	"	"	"	
Busy Lizzie	23568	1/18/27	"	"	"	"	
Listen Lena	23641	2/8/27	"	"	"	"	
Hot Lightning	23747	3/8/27	"	"	"	"	
Roped In	23745	3/8/27	"	"	"	"	
Brain Storms	23939	5/10/27	"	"	"	"	
Circus Capers	24075	6/14/27	"	"	"	"	
Queens Wild	24094	6/16/27	"	"	"	"	
No Cheating	24243	7/27/27	"	"	"	"	
Sure Cure	24184	7/14/27	"	"	"	"	
High Spots	24222	7/26/27	"	"	"	"	
Plumb Dumb	24281	8/10/27	"	"	"	"	
							$13,137 02
Felix the Cat Two Lip Time	23214	10/12/26	Pat Sullivan				
" " " Scrambled Yeggs	23202	10/11/26	"	"			
Felix the Cat.							
In Shatters the Sheik	23354	11/19/26	"	"			
" Hunts the Hunter	23301	11/8/26	"	"			
" Land O'Fancy	23355	11/19/26	"	"			
" Busts the Bubble	23385	11/30/26	"	"			
" Reverse English	23425	12/13/26	"	"			
" Trumps the Ace	23426	12/13/26	"	"			

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SCHEDULE "A" TO BILL OF COMPLAINT—Continued

Picture	Copyright No.	Copyright Date	Issued to	Rentals
In Collars the Button ..	23497	12 24 26	Pat Sullivan	....
" Zoo Logic	23502	1 4 27	" "	....
" Dines & Pines	23564	1/18/27	" "	....
" Pedigreedy	23643	2/ 8/27	" "	....
" Icy Eyes	23681	2/16/27	" "	....
" Stars in Stripes	23705	2/28/27	" "	....
" Sees 'Em in Season	23743	3/ 8/27	" "	....
" Barn Yarns	23799	3/28/27	" "	....
" Germania	23940	5/10/27	" "	....
" Sax Appeal	24242	7/27/27	" "	....
" Eye Jinks	24241	7/27/27	" "	....
" as "Roameo"	23966	5/16/27	" "	....
" Ducks His Duty	24097	6/16/27	" "	....
" Dough—Nutty	24400	9/14/27	" "	....
" A "Loco"—Motive	24183	7 12 27	" "	....
" Art For Heart's Sake	24232	7/27/27	" "	....
" Travel Hog	24282	8/10/27	" "	....
				$1,947 27

[fol. 24] At Ease	24397	9/12/27	Ed.	Film	Exchanges	Inc		
New Wrinkles	24607	11/1/27	"	"	"	"		
Papa's Baby	24809	12/27/27	"	"	"	"		
Always a Gentlemen	25018	2/5/28	"	"	"	"		
Between Jobs	25078	3/18/28	"	"	"	"		
Blazing Away	25137	3/22/28	"	"	"	"		
A Homemade Man	25323	6/4/28	"	"	"	"		
Listen Children	25462	7/16/28	"	"	"	"		
								$8,653 47
Poor Fish	4317	9/12/27	Edco.	Prod.	Unit	Inc		
The Cry of Winter	4363	10/12/27	"	"	"	"		
Burning Timber	4359	10/10/27	"	"	"	"		
Many Wings	4610	12/12/27	"	"	"	"		
Injun Food	4552	12/20/27	"	"	"	"		
Dog Days	4677	1/30/28	"	"	"	"		
Builders of Bridges	4727	2/15/28	"	"	"	"		
Feline Frolics	4835	3/10/28	"	"	"	"		
Hints on Hunting	4957	4/22/28	"	"	"	"		
A Peculiar Pair of Pups	4980	5/12/28	"	"	"	"		
Thoughts While Fishing	5113	6/25/28	"	"	"	"		
Wild Wool	5258	7/21/28	"	"	"	"		
The Fighting Orphans	5259	8/19/28	"	"	"	"		
								$601 92

SCHEDULE "A" TO BILL OF COMPLAINT—Continued

Picture	Copyright No.	Date	Issued to	Rentals
Batter Up	24372	8/17/27	Ed. Film Exchanges Inc	
Fox Tales	24472	10/4/27	" " " "	
Sewing Stars	24578	10/27/27	" " " "	
Brunettes Prefer Gentlemen	24765	12/18/27	" " " "	
Red Hot Bullets	24730	11/28/27	" " " "	
Racing Mad	24874	1/8/28	" " " "	
High Strung	24976	1/29/28	" " " "	
His Maiden Voyage	25019	2/26/28	" " " "	
Indiscreet Pete	25079	3/11/28	" " " "	
Kitchen Talent	25209	4/20/28	" " " "	
At It Again	25240	5/7/28	" " " "	
Who's Lyin'	25276	5/10/28	" " " "	
Ladies Preferred	25476	7/18/28	" " " "	
Leaping Luck	25467	7/17/28	" " " "	
Just Dandy	25548	8/20/28	" " " "	
				$16,078 59
The Non-Stop Flight	24426	9/20/27	Pat Sullivan	
Wise Guise	24681	11/1/27	" "	

Film Flam Films	24617	11/ 3/27	"	"	
Switches Witches	24644	11/ 7/27	"	"	
No Fuelin'	24664	11/16/27	"	"	
Daze and Knights	24709	11/28/27	"	"	
Uncle Tom's Crabbin	24710	11/28/27	"	"	
Why and other Whys	24964	12/27/27	"	"	
Hits the Deck	24878	12/19/27	"	"	
Behind in Front	24929	12/12/27	"	"	
The Smoke Scream	24903	1/ 8/28	"	"	
Draggin' the Dragon	25081	2/26/28	"	"	
The Oily Bird	25082	2/ 5/28	"	"	
Ohm Sweet Ohm	25080	2/19/28	"	"	
Japanicky	25139	3/14/28	"	"	
Polly-Ties	25150	3/18/28	"	"	
Sure-Lock Homes	25277	4/15/28	"	"	
Eskimotive	25321	6/ 4/28	"	"	
Arabianties	25416	5/13/28	"	"	
In and Outlaws	25576	7/27/28	"	"	
Outdoor Indore	25465	6/21/28	"	"	
Futuritzy	25577	7/24/28	"	"	
Astronomeous	25623	9/17/28	"	"	
Jungle Bungles	25732	9/18/28	"	"	
The Fast Life	25733	9/18/28	"	"	

$459 82

SCHEDULE "A" TO BILL OF COMPLAINT—Continued

Picture	Copyright No.	Copyright Date	Copyright Issued to	Rentals
[fol. 25] There It Is	24904	1/ 2/28	Bowers Comedy Corporation	
Say Ah-h	25010	2/19/28	" " "	
Whoozit	25116	4/ 1/28	" " "	
You'll Be Sorry	25213	5/ 7/28	" " "	
Hop Off	25377	6/16/28	" " "	
Goofy Birds	25546	8/12/28	" " "	
				351 82
A Half Pint Hero	24453	9/26/27	Ed. Film Exchanges, Inc	
Some Scout	24661	11/14/27	" " " "	
Hellow Sailor	24799	12/27/27	" " " "	
Sword Points	25040	2/12/28	" " " "	
Listen Sister	25108	3/25/28	" " " "	
Fandango	25151	4/ 6/28	" " " "	
Hectic Days	25324	6/ 4/28	" " " "	
Roaming Romeo	25464	7/16/28	" " " "	
				9,397 47

She's A Boy	24587	10/29/27	Ed. Film Exchanges, Inc	..
Shamrock Alley	24749	10/27/27	" " " "	
Angel Eyes	24905	1/23/28	" " " "	
Chilly Days	24965	2/ 8/28	" " " "	
No Fare	25152	4/ 8/28	" " " "	
Navy Beans	25287	5/17/28	" " " "	
The Gloom Chaser	25349	6/11/28	" " " "	
Kid Hayseed	25491	7/28/28	" " " "	
				12,487 62
Holly Nuts	24529	10/20/27	Futter Productions Inc	..
Back Home	24497	10/10/27	" " "	..
For Men Only	4456	11/16/27	Ed. Film Exchanges, Inc	..
Lovingly Yours	4638	1/16/28	Futter Productions Inc	..
New York's Sweetheart	4609	1/ 1/28	" " "	..
Rubber Necking	4731	2/ 5/28	" " "	..
Mother Bird	4942	3/ 4/28	" " "	..
Penny Postals	25142	4/10/28	" " "	..
All Bear	4979	4/29/28	" " "	..
Just For Art	5063	6/11/28	" " "	..
				1,415 71

Picture	Copyright No.	Copyright Date	Copyright Issued to	Rentals
The Stunt Man	24579	10/27/27	Ed. Film Exchanges, Inc	
Oh What A Man	24728	11/28/27	" " " "	
Dummies	24841	1/ 2/28	Chadwick Productions	
A Simple Sap	25041	2/12/28	" "	
				7,350 75
Up In Arms	24588	10/29/27	Ed. Film Exchanges, Inc	
Kilties	24550	10/24/27	" " " "	
The Little Rube	24705	11/27/27	" " " "	
Cutie	24875	1/15/28	" " " "	
Circus Blues	25138	3/25/28	" " " "	
Rah Rah Rah	25275	5/ 5/28	" " " "	
				5,280 53
Live News	24373	9/ 7/27	Ed. Film Exchanges, Inc	
Scared Silly	24707	11/27/27	" " " "	
Wildcat Valley	24927	1/22/28	" " " "	
Visitors Welcome	25077	3/ 4/28	" " " "	

Slippery Head	25179	4/24/28	"	"	"	"		
Blondes Beware	25411	6/25/28	"	"	"	"		
								7,348 80
Baby Be Good	22140	12/17/25	Ed. Film Exchanges, Inc					
Bachelor's Babies	22242	1/11/26	"	"	"	"		
Sea Scamps	22434	3/ 2/26	"	"	"	"		
Raisin' Cain	22614	4/ 4/26	"	"	"	"		
Bear Cats	22735	5/17/26	"	"	"	"		
Excess Baggage	23016	8/12/26	"	"	"	"		
								501 08
[fol. 25½] Off His Beat	21899	10/13/25	Christie Film Co., Inc					
Hot Doggie	22200	12/30/25	"	"	"	"		
Weak But Willing	22422	2/26/26	"	"	"	"		
Wireless Lizzie	22519	3/ 7/26	"	"	"	"		
Fresh Faces	22712	4/25/26	"	"	"	"		
Hitchin' Up	23369	11/19/26	"	"	"	"		
Watch Out	21868	10/ 3/25	"	"	"	"		
Slippery Feet	22198	12/30/25	"	"	"	"		
Yes Yes Babette	22330	1/26/26	"	"	"	"		
Page Me	22553	2/27/26	"	"	"	"		

Schedule "A" to Bill of Complaint—Continued

Picture	Copyright No.	Copyright Date	Issued to	Rentals
Broken China	22677	4/11/26	Christie Film Co., Inc.	
Till We Eat Again	22812	5/24/26	" " " "	
Soup to Nuts	21846	9/24/25	" " " "	
A Misfit Sailor	22273	11/19/26	" " " "	
A Goofy Gob	22199	12/30/25	" " " "	
My Swedie	22274	1/19/26	" " " "	
A Salty Sap	22433	3/2/26	" " " "	
Run Tin Can	22464	2/21/26	" " " "	
Dancing Daddy	22568	3/28/26	" " " "	
Shore Shy	22711	4/25/26	" " " "	
Papa's Pest	22887	7/8/26	" " " "	
Be Careful	21911	10/19/25	" " " "	
Fair But Foolish	22241	1/11/26	" " " "	
For Sadie's Sake	22329	1/25/26	" " " "	
Who Emma	22554	3/14/26	" " " "	
Gimmie Strength	22734	5/9/26	" " " "	
Chase Yourself	22888	7/8/26	" " " "	

572 13

The Tourist	21845	9 24 25	Ed. F. Ex., Inc	
Cleaning Up	22347	1 2 26	" " " "	
My Stars	22502	3 17 26	" " " "	
Home Cured	22584	3 14 26	Christie Film Co., Inc	
Mr. Cinderella	22710	5 2 26	Ed. F. Ex., Inc	
Honest Injun	22954	7 17 26	" " " "	
				1,151 66
Trifles With Time	21900	11 3 25	Pat Sullivan	
Busts Into Business	21964	11 3 25	" "	
Trips Thru Toyland	22019	11 19 25	" "	
On The Farm	22214	11 4 25	" "	
On The Job	22060	12 2 25	" "	
In the Cold Rush	22191	12 29 25	" "	
In Eats are West	22190	12 29 25	" "	
Tries The Trades	22268	1 14 20	" "	
In The Rainbow's End	22192	12 29 25	" "	
Kept On Walking	22282	1 21 26	" "	
Spots The Spooks	22449	3 5 26	" "	
Flirts With Fate	22432	3 2 26	" "	
In Blunderland	22602	3 9 26	" "	
Fans The Flames	22603	3 21 26	" "	
Laughs It Off	22713	4 17 26	" "	

Picture	Copyright No.	Copyright Date	Issued to	Rentals
Weather's The Weather	22752	4/21/26	Pat Sullivan	..
Uses His Head	22904	7/13/26	" "	
Misses The Cue	22920	7/19/26	" "	
In A Tale of Two Kitties	23408	12/ 9/26	" "	
Scoots Thru Scotland	22921	7/19/26	" "	
Rings the Ringer	22956	7/26/26	" "	
In School Daze	23007	8/ 9/26	" "	
Seeks Solitude	23187	10/ 5/26	" "	
Misses His Swiss	23117	9/15/26	" "	
In Gym Gems	23188	10/ 5/26	" "	
				946 24
The Movies	21901	10 13 25	Ed. F. Ex., Inc	
Framed	22275	1 20 26	" " " "	..
Careful Please	22437	3 2 26	" " " "	..
Nobody's Business	22657	4 4 26	" " " "	..
Nothing Matters	23228	10 19 26	" " " "	..
Here Comes Charlie	22847	6 28 26	" " " "	..
				7,318 29

[fol. 26] Maid in Moracco	22106	12/11/25	Ed. Film Exchanges, Inc.				
The Fighting Dude	22194	12/29/25	"	"	"	"	
Time Flies	22436	3/ 2/26	"	"	"	"	
Fools Luck	22833	6/22/26	"	"	"	"	
His Private Life	22709	5/11/26	"	"	"	"	
							2,102 93
Pleasure Bound	22018	11/19/25	Ed. Film Exchanges, Inc.				
Fair Warning	21866	10/ 1/25	"	"	"	"	
Spot Light	22195	12/29/25	"	"	"	"	
Fire Away	22193	12/29/25	"	"	"	"	
On Edge	22328	1/25/26	"	"	"	"	
Cheap Skates	22196	12/29/25	"	"	"	"	
Live Cowards	22503	3/16/26	"	"	"	"	
Lickety Split	22490	3/16/26	"	"	"	"	
Hold Your Hat	22491	3/16/26	"	"	"	"	
Light Housekeeping	22435	3/ 2/26	"	"	"	"	
Sky Bound	22521	3/24/26	"	"	"	"	
The Tin Ghost	22861	6/18/26	"	"	"	"	
Going Crazy	22708	5/ 9/26	"	"	"	"	
Creeps	22807	5/29/26	"	"	"	"	
Who's My Wife	23034	8/17/26	"	"	"	"	
Who Hit Me	23017	8/12/26	"	"	"	"	

Picture	Copyright No.	Copyright Date	Issued to	Rentals
Solid Gold	23009	8 8 26	Ed. Film Exchanges, Inc.	
Kiss Papa	23077	9 7 26	" " " "	
				6,045 25
Pirates Beware	25654	9 9 28	Ed. Film Exchanges, Inc.	
Fisticuffs	25804	10 26 28	" " " "	
Be My King	25923	12 18 28	" " " "	
Only Me	169	1 20 29	" " " "	
Summer Saps	343	3 17 29	" " " "	
Good Night Nurse	332	4 23 29	" " " "	
Battling Sister	447	6 2 29	" " " "	
Joy Land	628	7 27 29	" " " "	
				5,258 73
Girlies Behave	25627	9 20 28	Ed. Film Exchanges, Inc.	
The Quiet Worker	25824	9 4 28	" " " "	
Wives Won't Weaken	25988	12 6 28	" " " "	
Beauties Beware	135	1 27 29	" " " "	

Wise Wimmin	342	3 31 29	"	"	"	"	
Only Her Husband	371	5 13 29	"	"	"	"	
Studio Pests	759	10 14 29	"	"	"	"	
Fake Flappers	668	8 27 29	"	"	"	"	
							442 50
Call Your Shots	25621	9 17 28	Ed. Film Exchanges, Inc.				
Polar Perils	25729	9 30 28	"	"	"	"	
Stage Frights	25825	10 21 28	"	"	"	"	
Hold That Monkey	25863	11 26 28	"	"	"	"	
Hot or Cold	25990	12 12 28	"	"	"	"	
Social Prestige	25924	12 17 28	"	"	"	"	
Going Places	346	3 13 29	"	"	"	"	
Whoopee Boys	197	2 10 29	"	"	"	"	
Smart Steppers	269	3 3 29	"	"	"	"	
Parlor Pests	330	3 24 29	"	"	"	"	
Howling Hollywood	311	4 18 29	"	"	"	"	
Those Two Boys	387	5 5 29	"	"	"	"	
Hot Times	491	6 23 29	"	"	"	"	
What A Day	454	6 10 29	"	"	"	"	
Top Speed	610	7 17 29	"	"	"	"	
Honeymoonies	639	7 28 29	"	"	"	"	
							1,274 00

SCHEDULE "A" TO BILL OF COMPLAINT—Continued

Picture	Copyright No.	Copyright Date	Issued to	Rentals
[fol. 27] Companionate Service	25731	9/17/28	Ed. Film Exchanges, Inc.	
Misplaced Husbands	25991	12/24/28	" " " "	
Auntie's Mistake	268	2/17/29	" " " "	
				150.00
Wedded Blisters	25888	11/24/28	Ed. Film Exchanges, Inc.	
Making Whoopee	25802	10/27/28	" " " "	
Husbands Must Play	134	1/16/29	" " " "	
				375.00
Hot Luck	25622	9/17/28	Ed. Film Exchanges, Inc.	
Come To Papa	25730	10/14/28	" " " "	
Follow Teacher	25987	12/16/28	" " " "	
The Fixer	164	2/ 9/29	" " " "	
Ginger Snaps	270	3/ 2/29	" " " "	
Joy Tonic	372	5/ 5/29	" " " "	
Helter Skelter	455	6/ 9/29	" " " "	
Sole Support	669	8/27/29	" " " "	
				307.95

EXHIBIT "B" TO BILL OF COMPLAINT

FORM 3 FT 6-15-29-250,000 (3-4274) Page 1

EVERY CORPORATION INCORPORATED PRIOR TO NOV. 1, 1929, MUST REPORT

(29) Every corporation incorporated prior to July 1, 1929, must make this report. (See EXCEPTION, page 4, under Special Instructions)

FRANCHISE TAX ON BUSINESS CORPORATIONS

TO DEPARTMENT OF TAXATION AND FINANCE, ALBANY, N. Y.

This report is DUE JULY 1, 1929. Corporations filing reports with the United States Treasury Department after June 1, 1929, for a fiscal year ending before July 1, 1929, must file this report within thirty days after such filing and give date of filing federal report.

The report must cover the conditions and the entire net income for the corporation's last fiscal year ending on or before June 30, 1929.

NEW CORPORATIONS see special instructions on page four (4).

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EDUCATIONAL FILMS CORPORATION OF AMERICA
(Name of corporation) (Exact corporate title)

1501 BROADWAY NEW YORK N.Y
(Mail address) (Full details for delivery of blanks and notices of assessment must appear above)

(1) Organized May, 1925, under the Laws of N.Y. (2) Began business in New York ....., 19.....

(3) If not incorporated under the laws of New York, has it been legally authorized to do business in New York State? .....

(4) Authorized capital stock, $ 200000.00 (5) Amount of average indebtedness for year, $ 14959385
(Exclusive of capital stock)

Answers to Item 6 below must show issued and subscribed stock as of June 30, 1929.

(6) Number of shares	Par value per share	Total par value	(6-a) Dividends paid during fiscal or calendar year
Common 15000	$ 10.00	$ 150000.00	$ .....
Preferred 5000	$ 10.00	$ 50000.00	$ 198500 -
Non par value None	Am't paid in on same	$	$ .....

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T 2%

Any capital stock issued or subscribed after June 30, 1929 and prior to November 1, 1929 must be reported to the Department of Taxation and Finance, Corporation Bureau, within 30 days after November 1st, 1929.

(7) If your fiscal year has been changed since July 1, 1927, how? None

(8) ENTIRE NET INCOME FOR THE ~~YEAR ENDING DECEMBER 31, 1928~~, or the FISCAL YEAR (PERIOD) COMMENCING July 1, 1928 AND ENDING June 30 1929, as shown by its report to the UNITED STATES TREASURY DEPARTMENT $ 231377.94

(Note: Above answer must agree with report to Federal Government for a period ending between July 1, 1928 and June 30, 1929).

(8-a) State entire amount of salary and other compensation paid to all appointed or elected officers and to all stockholders owning in excess of 5% of issued stock ..... $ 15000.00

(9) Dividends received from corporations, not included in (8) ..... $ None

(10) State amount of interest received from Federal, state, municipal, or other obligations, not included in item (8) $ None

(11) *TOTAL GROSS INCOME* reported at item 11 on Federal Income Tax Return for the above period.. $ 585163.35

(11-a) DEDUCTIONS (as shown on federal report)

(a) Compensation of officers	$ 15000.00	(f) Losses by fire, storm	$ .....
(b) Rent on business property	$ 7808.56	(g) Bad debts	$ .....
(c) Repairs	$ 327.00	(h) Depreciation	$ 51.60
(d) Interest	$	(j) Depletion	$ .....
(e) Taxes (Item 16 Fed. Rpt.)	$ 10486.13		

(k) Other deductions not shown above must be shown in detail ON SHEET ATTACHED ..... $ 175112.18

TOTAL DEDUCTIONS shown above ..... $ 153790.41

Item 11 above less item 11-a above ..... $ 231377.94

(12) If the entire net income as first returned was changed by the Federal Government, state the amount of such entire net income as finally determined for the year ending (If no change made insert the word "None")

1919, $		1923, $	
1920, $		1924, $	
1921, $		June 30 1925, $	130379 10
1922, $		" 1926, $	None

INSERT MONTH AND DAY

(13) If a corporation is not organized under the laws of any state within the United States it should return its entire net income, wherever earned, $ .....

Amount claimed to be correct, $ 68783.94 (See Attached Explanation)

THIS REPORT MUST BE SWORN TO ON PAGE FOUR

ALL QUESTIONS ON THIS BLANK MUST BE ANSWERED

year ending before July 1, 1929, must file this report within thirty days after such filing and give date of filing federal report.
The report must cover the conditions and the entire net income for the corporation's last fiscal year ending on or before June 30, 1929.

NEW CORPORATIONS see special instructions on page four (4).

DO NOT WRITE IN THIS SPACE

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EDUCATIONAL FILMS CORPORATION OF AMERICA
(Name of corporation) (Exact corporate title)

1501 BROADWAY NEW YORK N.Y.
(Mail address) (Full details for delivery of blanks and notices of assessment must appear above)

(1) Organized May, 1925, under the Laws of N.Y. (2) Began business in New York, 19

(3) If not incorporated under the laws of New York, has it been legally authorized to do business in New York State?

(4) Authorized capital stock, $200000.00 (5) Amount of average indebtedness for year, $1495913.85 (Exclusive of capital stock)

Answers to item 6 below must show issued and subscribed stock as of June 30, 1929.

(6) Number of shares	Par value per share	Total par value	(6-a) Dividends paid during fiscal or calendar year
Common 15000	$10.00	$150000.00	$
Preferred 5000	$10.00	$ 50000.00	$198500.-
Non par value none	Am't paid in on same	$	$

B
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T 2%

Any capital stock issued or subscribed after June 30, 1929 and prior to November 1, 1929 must be reported to the Department of Taxation and Finance, Corporation Bureau, within 30 days after November 1st, 1929.

(7) If your fiscal year has been changed since July 1, 1927, how? none

(8) ENTIRE NET INCOME FOR THE ~~YEAR ENDING DECEMBER 31, 1928~~ or the FISCAL YEAR (PERIOD) COMMENCING July 1, 1928 AND ENDING June 30 1929, as shown by its report to the UNITED STATES TREASURY DEPARTMENT $ 231377.94

(Note: Above answer must agree with report to Federal Government for a period ending between July 1, 1928 and June 30, 1929).

(8-a) State entire amount of salary and other compensation paid to all appointed or elected officers and to all stockholders owning in excess of 5% of issued stock ..... $ 15000.00

(9) Dividends received from corporations, not included in (8) ..... $ none

(10) State amount of interest received from Federal, state, municipal, or other obligations, not included in item (8) $ none

(11) *TOTAL GROSS INCOME* reported at item 11 on Federal Income Tax Return for the above period.. $ 585163.35

(11-a) DEDUCTIONS (as shown on federal report)

(a) Compensation of officers	$ 15000.00	(f) Losses by fire, storm	$
(b) Rent on business property	$ 2808.56	(g) Bad debts	$
(c) Repairs	$ 327.00	(h) Depreciation	$ 51.60
(d) Interest	$	(j) Depletion	$
(e) Taxes (Item 16 Fed. Rpt.)	$ 10486.13		

(k) Other deductions not shown above must be shown in detail ON SHEET ATTACHED ..... $ 175112.18

TOTAL DEDUCTIONS shown above ..... $ 153790.41

Item 11 above less item 11-a above ..... $ 231377.94

THIS REPORT MUST BE SWORN TO ON PAGE FOUR

ALL QUESTIONS ON THIS BLANK MUST BE ANSWERED

(12) If the entire net income as first returned was changed by the Federal Government, state the amount of such entire net income as finally determined for the year ending (If no change made insert the word "None")

1919, $		1923, $	none
1920, $	none	1924, $	
1921, $		June 30 1925, $	130379.10
1922, $		" 1926, $	none

INSERT MONTH AND DAY

(13) If a corporation is not organized under the laws of any state within the United States it should return its entire net income, wherever earned, $ none

(14) If the amount reported in (8) is inaccurate state the amount claimed to be correct, $ 68789.94 (See Attached Explanation)

(15) Nature of business and how transacted Distributing of Motion Picture Films

(16) Place, street and number where business is conducted 1501 Broadway New York

(17) State the city or town, street number and state where the company maintained any permanent store, warehouse, factory or other place of continuous business outside the State of New York during the year none

(18) Any corporation EXCEPT ONE HAVING STOCK WITHOUT PAR VALUE, may omit the segregation of assets on page 2 *only* by signing the following consent:

I AM AUTHORIZED by the Board of Directors of this corporation to consent and I do hereby consent that said corporation be taxed upon its entire net income at 4½ per cent or as otherwise provided by law.

Do not sign consent unless taxable by the State of New York on entire income or entire issued capital stock.

28

(19) Does this corporation own a majority of the stock of another or other corporations? No Give names of e

(20) Is a majority of the stock of this corporation owned by another corporation? Yes If so, by what other? Educational Pictures Inc

(21) Did this corporation file a consolidated report with the United States Treasury Department? No

(21-a) If so, state amount of consolidated net income, $

(22) Were its income and assets included in the consolidated report of another corporation? Yes

If so, name of corporation reporting the consolidated net income Educational Pictures Inc

and amount of net income so reported, $ X27,39

(23) Give the names and net income or loss attributable to each corporation, including the reporting corporation, included in the consolidated report, and specify whether gain or loss

See Schedule Attached $

$ $

$ $

(24) Has this corporation since January 1, 1917, either directly or indirectly, acquired by merger, consolidation or purchase, the major part of the assets or the franchise of any other corporation or corporations? No

Has it merged or consolidated any other corporation or corporations? No

If so, give name of each corporation and date of acquisition, merger or consolidation

(25) Has the entire net income of any corporation which has been acquired by, or merged or consolidated with this company been changed by the Federal Government, and not heretofore reported to the State Tax Department? (Answer "Yes" or "No")

If changed, reduce such changes to affidavit form and file with this report.

SEGREGATION OF ASSETS NOT INCLUDING THOSE OF ANY OTHER CORPORATION

(The segregation must be based on same fiscal or calendar year as report)

Read: The following segregations MUST be made by all corporations having stock without par value and all corporations which have not signed consent (18)

TOTAL SEGREGATED ASSETS WHEREVER LOCATED

(26-a) Average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from personal property sold by the corporation from merchandise manufactured by it within and without this state	$
(26-b) Average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from the purchase, or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans	$
(26-c) ‡Average monthly value of all its real property wherever located (actual value)	$
(26-d) ‡Average monthly actual value of all machinery and fixtures wherever located	$
(26-e) ‡Average monthly actual value of all other tangible personal property wherever located	$
(26-f) §Average total *actual* value of shares of stocks of other corporations owned by this corporation (notes, bonds, cash and evidences of debt must not be included). (Note: List of shares must be made on separate sheet and show corporate name, number of shares held, par value per share, actual value.)	$
Total	$
(26-g) Does the segregation above made include assets of any subsidiary or other corporation?	

ADDITIONAL INFORMATION — To be used to determine fees under § 181 of Tax Law and one mill tax.

(27-a) Average monthly bank and cash balance during the year	$
(27-b) Average value of bills and accounts receivable during the year arising from advances or loans and not included above	$
(27-c) Average value of bonds, loans on call and other financial securities wherever held, used or employed during the year (not including shares of stock)	$

ASSETS SEGREGATED TO NEW YORK STATE ONLY

(28-a) Average monthly value of bills and accounts receivable arising from personal property sold by the corporation from merchandise manufactured by it within this State	$
(28-b) Average monthly value of bills and accounts receivable arising from personal property owned by the corporation and not manufactured by it within this State but sold by it or its agents and located within the State at the time of the receipt of the order	$
(28-c) Average monthly value of bills and accounts receivable arising from the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the State and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this State	$
(28-d) Average monthly value of bills and accounts receivable arising from services performed by any officer, agent or representative of the corporation connected with, sent from, or reporting, either directly or indirectly, to any officer located in this State or at any office located, owned, rented or occupied in this State	$
(28-e) ‡Average monthly value of its real property within this State as detailed in this report (actual value)	$
(28-f) ‡Average monthly actual value of all machinery and fixtures in New York State	$
(28-g) ‡Average monthly actual value of all other tangible personal property in New York State	$
(28-h) §Average total *actual* value of shares of stocks of other corporations owned by it and allocated to this State by rule below	$
Total	$

(21-a) If so, state amount of consolidated net income, $ _____

(22) Were its income and assets included in the consolidated report of another corporation? Yes

If so, name of corporation reporting the consolidated net income Educational Pictures Inc

and amount of net income so reported, $ 207.39

(23) Give the names and net income or loss attributable to each corporation, including the reporting corporation, included in the consolidated report, and specify whether gain or loss

See Schedule Attached $ _____

_____ $ _____

_____ $ _____

(24) Has this corporation since January 1, 1917, either directly or indirectly, acquired by merger, consolidation or purchase, the major part of the assets or the franchise of any other corporation or corporations? No

Has it merged or consolidated any other corporation or corporations? No

If so, give name of each corporation and date of acquisition, merger or consolidation _____

(25) Has the entire net income of any corporation which has been acquired by, or merged or consolidated with this company been changed by the Federal Government, and not heretofore reported to the State Tax Department? _____ (Answer "Yes" or "No")

If changed, reduce such changes to affidavit form and file with this report.

SEGREGATION OF ASSETS NOT INCLUDING THOSE OF ANY OTHER CORPORATION

(This segregation must be based on same fiscal or calendar year as report)

Read: The following segregations MUST be made by all corporations having stock without par value and all corporations which have not signed consent (18)

TOTAL SEGREGATED ASSETS WHEREVER LOCATED

(26-a) Average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from personal property sold by the corporation from merchandise manufactured by it within and without this state	$
(26-b) Average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from the purchase, or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans	$
(26-c) ‡Average monthly value of all its real property wherever located (actual value)	$
(26-d) ‡Average monthly actual value of all machinery and fixtures wherever located	$
(26-e) ‡Average monthly actual value of all other tangible personal property wherever located	$
(26-f) §Average total *actual* value of shares of stocks of other corporations owned by this corporation (notes, bonds, cash and evidences of debt must not be included). (Note: List of shares must be made on separate sheet and show corporate name, number of shares held, par value per share, actual value.)	$
Total	$
(26-g) Does the segregation above made include assets of any subsidiary or other corporation?	

ADDITIONAL INFORMATION — To be used to determine fees under § 181 of Tax Law and one mill tax.

(27-a) Average monthly bank and cash balance during the year	$
(27-b) Average value of bills and accounts receivable during the year arising from advances or loans and not included above	$
(27-c) Average value of bonds, loans on call and other financial securities wherever held, used or employed during the year (not including shares of stock)	$

ASSETS SEGREGATED TO NEW YORK STATE ONLY

(28-a) Average monthly value of bills and accounts receivable arising from personal property sold by the corporation from merchandise manufactured by it within this State	$
(28-b) Average monthly value of bills and accounts receivable arising from personal property owned by the corporation and not manufactured by it within this State but sold by it or its agents and located within the State at the time of the receipt of the order	$
(28-c) Average monthly value of bills and accounts receivable arising from the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the State and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this State	$
(28-d) Average monthly value of bills and accounts receivable arising from services performed by any officer, agent or representative of the corporation connected with, sent from, or reporting, either directly or indirectly, to any officer located in this State or at any office located, owned, rented or occupied in this State	$
(28-e) ‡Average monthly value of its real property within this State as detailed in this report (actual value)	$
(28-f) ‡Average monthly actual value of all machinery and fixtures in New York State	$
(28-g) ‡Average monthly actual value of all other tangible personal property in New York State	$
(28-h) §Average total *actual* value of shares of stocks of other corporations owned by it and allocated to this State by rule below	$
Total	$

ADDITIONAL INFORMATION — To be used to determine fees under § 181 of Tax Law and one mill tax.

(29-a) Average monthly bank and cash balance in New York State during the year	$
(29-b) *Average value of all bills and accounts receivable in New York State during the year	$
(29-c) Average value of bonds, loans on call and other financial securities held, used or employed in New York during the year (not including shares of stock)	$

* All bills and accounts receivable due for goods located in New York State at the time of sale or receivable by the corporation at an office within New York State and not already included in (a), (b), (c), and (d). In assets segregated to New York State, must be included in this item.

‡ Real property and tangible personal property shall be taken at its actual value where located.

§ The value of shares of stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the State in accordance with the value of the physical property in and out of the State representing such share stock.

OFFICERS SCHEDULE FOR THE FISCAL OR CALENDAR YEAR COVERED BY THIS REPORT

Name and Residence	Title	Salary	All other Compensation	Number Shares Held	
				Preferred	Common
C. W. Hammes	Pres	5000.00			None
Bruno Meyers	Vice Pres	10000.00			None
		15000.-			

MUST BE ANSWERED

Are any of the above named officers also officers in any other corporation? .....
If so, add rider, showing in what company, title, and salary or other compensation received from such other companies during fiscal or calendar year covered by this report.

(31) Was any stock, owned during the period of this report by an elected or appointed officer, transferred or assigned to any relative or agent? ..... If so, by whom and to whom was such stock assigned and what relationship to assignee?

1. From ..... To .....
2. " ..... " .....
3. " ..... " .....

(31-a) 1. In what amount $ ..... Number of shares .....
2. " " " $ ..... " " " .....
3. " " " $ ..... " " " .....

(32) Schedule for stockholders (not including any in officers' schedule) owning more than five percent of issued capital stock.

Name in full	Total compensation of every character received from this corporation
	$

(33) THE FOLLOWING INFORMATION REQUIRED BASED ON FISCAL OR CALENDAR YEAR

(A) Gross sales from trading or manufacturing, less returns and allowances ..... $ None
(B) Gross profit from trading and manufacturing ..... $ None
(C) ~~Gross profit~~ from other than trading and manufacturing ~~including Mayer's~~ as from Copyrights $ 385163.35
(D) Entire assets ..... $ 2177058.05
(E) Entire liabilities, excluding capital stock and surplus ..... $ 1825194.56
(F) Net worth as shown by balance sheet at end of calendar or fiscal year ..... $ 351863.49
(G) Number of people employed, average 10
(H) What was the total par value of all: (1) Federal bonds $ None; (2) Federal Farm Loans $ None;
(3) State and Municipal Bonds $ None; (4) All other obligations shown in your return to the Federal Government and exempt from Federal Income Tax $ None
(If none are held, insert the word "None.")

(34) Average price at which this corporation's stocks sold during the year		High	Low
	Common		
	Preferred	no sales	
	No par		

(35) How many shares of the corporation's stock were transferred on its books during the period covered by this report? .....

MUST BE ANSWERED

(36) **Does this corporation use or occupy any part of the real property of another corporation which it owns or controls, either directly or indirectly?** No
(Answer "Yes" or "No")

(37) **If the answer is "Yes" name the corporation holding such real estate** .....

(38) **Does this company use or occupy any part of the real property of another corporation which either directly or indirectly owns or holds a controlling interest in this corporation?** No
(Answer "Yes" or "No")

(39) **If the answer is "Yes" name the corporation holding such real estate** .....

Irma Meyer	Vice Pres	10000 00			None
		15000 -			

MUST BE ANSWERED

Are any of the above named officers also officers in any other corporation?.....
If so, add rider, showing in what company, title, and salary or other compensation received from such other companies during fiscal or calendar year covered by this report.

(31) Was any stock, owned during the period of this report by an elected or appointed officer, transferred or assigned to any relative or agent?..... If so, by whom and to whom was such stock assigned and what relationship to assignee?

1. From..... To.....
2. " ..... "
3. " ..... "

(31-a) 1. In what amount $..... Number of shares.....
2. " " " $..... " " "
3. " " " $..... " " "

(32) Schedule for stockholders (not including any in officers' schedule) owning more than five percent of issued capital stock.

Name in full	Total compensation of every character received from this corporation
	$

(33) THE FOLLOWING INFORMATION REQUIRED BASED ON FISCAL OR CALENDAR YEAR

(A) Gross sales from trading or manufacturing, less returns and allowances..... $ None
(B) Gross profit from trading and manufacturing..... $ None
(C) ~~Gross profit~~ from other than trading and manufacturing including Royalty from Copyrights $ 385163 35
(D) Entire assets..... $ 2177058 05
(E) Entire liabilities, excluding capital stock and surplus..... $ 1835194 56
(F) Net worth as shown by balance sheet at end of calendar or fiscal year..... $ 341863 49
(G) Number of people employed, average 10
(H) What was the total par value of all: (1) Federal bonds $ None; (2) Federal Farm Loans $ None;
(3) State and Municipal Bonds $ None; (4) All other obligations shown in your return to the Federal Government and exempt from Federal Income Tax $ None
(If none are held, insert the word "None.")

(34) Average price at which this corporation's stocks sold during the year		High	Low
	Common		
	Preferred no sales		
	No par		

(35) How many shares of the corporation's stock were transferred on its books during the period covered by this report?.....

MUST BE ANSWERED

(36) **Does this corporation use or occupy any part of the real property of another corporation which it owns or controls, either directly or indirectly?** No (Answer "Yes" or "No")

(37) **If the answer is "Yes" name the corporation holding such real estate**.....

(38) **Does this company use or occupy any part of the real property of another corporation which either directly or indirectly owns or holds a controlling interest in this corporation?** No (Answer "Yes" or "No")

(39) **If the answer is "Yes" name the corporation holding such real estate**.....

SPECIAL INSTRUCTIONS TO NEW CORPORATIONS

The Commission will permit corporations subject to taxation under Article 9-a of the tax law, organized between January 1st and July 1st, 1929, to omit filing report on form 3-IT due July 1st, 1929, conditioned that such corporations file a report on form 60 C. T. during the month of November, 1929.

Corporations organized between June 30th and November 1st, 1929 will be required to file a report on form 60 C. T.

This form will be mailed about November 1st, and the report must be filed not later than November 30th, 1929.

30

(40)

DISTRIBUTION SCHEDULE (Must be completed)

Do not confuse the political subdivisions "incorporated village" and "town."

Names of hamlets or postoffices other than incorporated villages are *not* wanted.

Schedule of Real and *Tangible* Personal Property in New York State
by Cities, Towns and Incorporated Villages

City of	County of	Personal actual value	Real estate actual value	Real estate assessed value
New York	New York	$ 201 40	$	$

Town of	Incorporated village of	County of			

(If more space is needed add a parter)

PENALTIES

Any OFFICER making a fraudulent report becomes personally liable to a FINE OF $1000.

The Law provides a PENALTY of not more than $5000 for neglect or refusal to file this report.

FOR FAILING, THROUGH NEGLIGENCE, TO PAY TAX WHEN DUE:

Ten per cent of the tax due and unpaid plus interest at the rate of 1 per cent per month during the period in which it remains unpaid.

INFORMATION

The word "average" wherever it appears in this report has its plain, ordinary significance; neither the highest amount nor the lowest, but the mean.

In making report every space must be used except where the blank states that the spaces are not to be filled. Wherever no figures are to be inserted the word "none" should be inserted.

If there is no net income to be returned in answer to paragraph (8) insert the word "deficit" and state the amount thereof.

ALL CORPORATIONS MUST MAKE THIS REPORT EXCEPT THE FOLLOWING:

(1) Real estate corporations wholly engaged in the purchase and sale of and holding title to real estate for themselves (this does not include so-called real estate companies having leasehold interests only, except as specified in subd. 2 below, or real estate agents or brokers).

(2) Corporations engaged in the business of subleasing real property held under a leasehold for a term of twenty years or more, by the terms of which the taxes on the real property are paid by the lessee corporation as part of the consideration for the leasehold.

(3) Corporations whose sole business consists of holding stocks of other corporations for the purpose of controlling the management and affairs of such other corporations, except such as are specifically subject to report under the provisions of subdivision nine of section two hundred and eleven of the tax law.

(4) Farmers', fruit growers', and other like agricultural corporations organized and operated on a co-operative basis for the purposes expressed in and as provided under the co-operative corporations law of the state of New York.

(5) Transportation, transmission, heating, lighting and power corporations, insurance companies, savings banks and other corporations taxable under Sections 184 to 189 of the tax law, inclusive.

(6) Corporations taxable under Articles 9-B and 9-C of the tax law.

Simply to write "out of business," "never began business," "dead," et ceters, is not a sufficient compliance to relieve from the penal provisions of the statute.

THIS TAX IS DUE AND PAYABLE ON OR BEFORE JANUARY 1, 1930, OR WITHIN 30 DAYS OF BILLING DATE IF BILLED AFTER DECEMBER 3, 1929. DO NOT SEND CHECK WITH REPORT.

AFFIDAVIT OF PRESIDENT, VICE-PRESIDENT, SECRETARY OR TREASURER

STATE OF NEW YORK,
County of New York } ss.:

On this 11th day of October A. D. 1929, personally appeared before me, a Notary Public in and for the County of David L. Hualle, of the above named company who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct and that it includes a true statement of the annual net income of said company for the year.

David L. Hualle

City of	County of	Assessed actual value	Assessed actual value	Assessed assessed value
New York	New York	$ 701 440		$

Town of	Incorporated village of	County of					

(If more space is needed add a paster)

PENALTIES

Any OFFICER making a fraudulent report becomes personally liable to a FINE OF $1000.

The Law provides a PENALTY of not more than $5000 for neglect or refusal to file this report.

FOR FAILING, THROUGH NEGLIGENCE, TO PAY TAX WHEN DUE:

Ten per cent of the tax due and unpaid plus interest at the rate of 1 per cent per month during the period in which it remains unpaid.

INFORMATION

The word "average" wherever it appears in this report has its plain, ordinary significance, neither the highest amount nor the lowest, but the mean.

In making report every space must be used except where the blank states that the spaces are not to be filled. Wherever no figures are to be inserted the word "none" should be inserted.

If there is no net income to be returned in answer to paragraph (8) insert the word "deficit" and state the amount thereof.

ALL CORPORATIONS MUST MAKE THIS REPORT EXCEPT THE FOLLOWING:

(1) Real estate corporations wholly engaged in the purchase and sale of and holding title to real estate for themselves (this does not include so-called real estate companies having leasehold interests only, except as specified in subd. 2 below, or real estate agents or brokers).

(2) Corporations engaged in the business of subleasing real property held under a leasehold for a term of twenty years or more, by the terms of which the taxes on the real property are paid by the lessee corporation as part of the consideration for the leasehold.

(3) Corporations whose sole business consists of holding stocks of other corporations for the purpose of controlling the management and affairs of such other corporations, except such as are specifically subject to report under the provisions of subdivision nine of section two hundred and eleven of the tax law.

(4) Farmers', fruit growers', and other like agricultural corporations organized and operated on a co-operative basis for the purposes expressed in and as provided under the co-operative corporations law of the state of New York.

(5) Transportation, transmission, heating, lighting and power corporations, insurance companies, savings banks and other corporations taxable under Sections 184 to 189 of the tax law, inclusive.

(6) Corporations taxable under Articles 9-B and 9-C of the tax law.

Simply to write "out of business," "never began business," "dead," et cetera, is not a sufficient compliance to relieve from the penal provisions of the statute.

THIS TAX IS DUE AND PAYABLE ON OR BEFORE JANUARY 1, 1930 OR WITHIN 30 DAYS OF BILLING DATE IF BILLED AFTER DECEMBER 3, 1929. DO NOT SEND CHECK WITH REPORT.

AFFIDAVIT OF PRESIDENT, VICE-PRESIDENT, SECRETARY OR TREASURER

STATE OF NEW YORK,
County of New York } ss:

On this 11th day of October A. D. 1929, personally appeared before me, a Notary Public in and for the County of Dana L. Hualla, of the above named company who, being duly sworn according to law, did depose and say that the foregoing report is just, true and correct and that it includes a true statement of the annual net income of said company for the year.

Dana L. Hualla

Treasurer
(Official title)

Sworn to before me the day and year aforesaid.

Bernard J. Kearney
Notary Public

Balto's Race To Nome	21518	6/ 1/25	Sol. Lessor		
					539 97
Zip! Boom! Bang!	355	4/17/29	Ed. Film Exchanges, Inc.		
					1,303 69
The Lion's Roar	25989	12/ 9/28	Mack Sennett Inc		
The Old Barn	345	5/ 1/29	" " "		
Broadway Blues	344	5/ 1/29	" " "		
The Bride's Relations	295	4/10/29	" " "		
Whirls and Girls	318	3/24/29	" " "		
The Bee's Buzz	373	5/15/29	" " "		
The Big Palooka	609	8/16/29	" " "		
Girl Crazy	623	7/30/29	" " "		
The Barber's Daughter	631	7/26/29	" " "		
The Constabule	712	9/24/29	" " "		
The Lunkhead	775	9/19/29	" " "		
The Golfers	1007	11/30/29	" " "		
A Hollywood Star	841	10/13/29	" " "		
Clancy At The Bat	958	12/ 3/29	" " "		
The New Half Back	972	11/24/29	" " "		
Uppercutt O'Brien	987	1/ 6/30	" " "		
					382 50
			Total		$162,588 98

(Here follow four pages of Exhibit B, side folios 28, 29, 30, and 31)

6—350

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[fol. 32] SCHEDULE 11-K

Year 1929, New York

Educational Films Corporation of America

General Expenses

Salaries	$15,000 68
Shipping Expense	1,500 97
Telephone and Telegraph	216.48
Selling Expense	3,720 98
Postage	12 53
Insurance	4,635 60
Legal Expense	742 46
London Office Expenses	3,000 00
Commissions	91,392 99
Vocafilm Expense	500.00
Directors' Fees	800 00
Miscellaneous	2,827 96
Office Supplies	3.55
Projection Room Expense	65 48
Storage	1,697 50
	$125,117 18

[fol. 33] Educational Films Corporation of America

Explanation of Item 14

The Company's Net Income as shown by its report to the United States Treasury Department (Item 8) is inapplicable and hence inaccurate for the purposes of the New York Franchise Tax, in that said Net Income was computed by including in the computation of the Gross Income the sum of $162,588.98, consisting of royalties, received by the Company on copyrights owned by it or its affiliated Companies and granted by the United States Government, which Royalty Income was not and is not subject to tax and may not be used as a measure of any tax purporting to be a Corporate Franchise Tax based on or measured by Income, under the Constitution of the United States and decisions of the United States Supreme

Court. The figure set forth in Item 14, viz $68,783.96 is therefore a corrected Net Income resulting from the exclusion from Gross Income of said Royalty Income.

[fol. 34] SCHEDULE 23

Year 1929, New York

Educational Films Corporation of America

Net Income of Each Corporation Included in the Consolidated Report

Educational Pictures, Inc	$10,528 56	
Educational Films Corporation of America	231,372 94	
Coronet Films Corporation	3,176 43	loss
Far East Film Corporation	20,284 15	
Educational Film Exchanges, Inc	31 88	
Educational Film Exchange of Atlanta, Inc.	19,388 04	loss
Educational Film Company of Eastern Penna., Inc.	6,956.50	"
Educational Film Exchange of Illinois, Inc.	15,906 15	"
Educational Film Exchange of Indiana, Inc.	6,774 00	
Educational Film Exchange of Iowa, Inc.	22,937 55	
Educational Film Exchange of Kentucky-Tennessee, Inc.	3,733 47	
Educational Film Exchange of Louisiana, Inc.	6,551 32	loss
The Educational Film Exchange of Michigan, Inc.	4,271 59	
Educational Film Exchange, Inc., of Pittsburgh	7,433 66	loss
Educational Film Exchange, Inc., of Missouri	9,181 62	"
Educational Film Exchange of Minnesota, Inc.	12,526 07	"
Educational Film Exchange of Northern California, Inc.	6,939 33	
Educational Film Exchange of Southern California, Inc	11,621 59	

Educational Film Exchange of Seattle, Inc.	22,780 80	
Educational Film Exchange of Texas, Inc.	5,237 62	loss
Educational Film Exchange of Wisconsin, Inc.	478 93	
Inter-Mountain Educational Film Exchange, Inc	11,999 67	loss
Mid-West Educational Film Exchange, Inc.	16,960 09	"
New York Exchange for Educational Films, Inc	71,850 08	"
The Ohio Exchange for Educational Films Co., Inc	7,041 45	"
	$2,027 39	loss

[fol. 35] In United States District Court

[Title omitted]

Affidavit of Dario L. Faralla

Southern District of New York,
City, County and State of New York, ss:

Dario L. Faralla, being duly sworn upon his oath deposes and says:

I am the Treasurer of Educational Films Corporation of America. As such treasurer, I verified, on the 11th day of October, 1929, the report of said corporation to the Department of Taxation and Finance with respect to its net income for the fiscal year ending June 30, 1929, copy of which is annexed to the bill of complaint herein as Exhibit "B" thereof and the facts therein stated are true to the best of deponent's knowledge and belief.

The plaintiff corporation is, and was during the said period, engaged in business as distributor and licensor of [fol. 36] motion picture productions copyrighted under the laws of the United States, and was the owner of several copyrights which are described by date, name and number in Schedule "A" annexed to said bill of complaint.

As indicated in said Schedule "A", certain of said copyrights are and were during said period held in the name of

said plaintiff corporation, and others were held in the name of other corporations as set forth in said schedule, including Educational Film Exchanges Inc., White Productions Inc., Robert C. Bruce, Edco Production Unit Inc. and Bowers Comedy Corporation, affiliated with said plaintiff corporation. All of said copyrights, however, whether or not standing in the name of plaintiff corporation are and were during the period aforesaid owned by plaintiff corporation, the latter having advanced and paid the costs of production thereof and having exclusive control and disposition thereof, and being entitled to all the income therefrom except certain agreed commissions and percentages paid in certain cases to corporations handling the production thereof upon plaintiff's order and at plaintiff's expense.

Plaintiff's gross income during said period, to the amount of $162,588.98, consisted of royalties received by plaintiff from said copyrights under socalled license contracts entered into between plaintiff and various exhibitors of motion pictures, whereby plaintiff, in consideration of the payment of said royalties, granted unto said exhibitors the right, for certain specified periods and in certain specified theatres or localities, to project and exhibit said copyrighted motion picture productions under said copyrights. [fol. 37] Annexed hereto as Exhibit "C" is a form of said license contract which was throughout said period uniformly used by plaintiff corporation (except for minor and immaterial diversity in dates, places, amounts, etc.), all of plaintiff's said income from said copyrights having during said period been paid to and received by plaintiff from licensees under contracts in that form.

The said sum, $162,588.98, thus received from licensees as royalties under said copyrights is exclusive of additional sums received from licensees for positive prints and other charges for which income no constitutional immunity is claimed herein.

As appears in the annexed return, Exhibit "B", verified by deponent, plaintiff has already submitted to the New York State Tax Commission, defendants herein, under oath, a statement that its income during said period to the amount aforesaid consisted of income from copyrights granted by the United States of America, and has duly demanded that said income be excluded from plaintiff's gross

income in the computation of the New York Franchise Tax based on plaintiff's net income for said period on the ground that plaintiff's right under the Constitution of the United States would be violated by the imposition of a tax on said income or a tax measured in whole or in part by said income, being income from a federal instrumentality, but said defendants have overruled said objection, and rejected said protest, and have refused to exclude said income from copyrights from plaintiff's gross income for the purpose of computing said tax and have accordingly demanded from plaintiff payment of the sum of $10,411.79 (being 4½% of plaintiff's net income, without excluding said copyright [fol. 38] income) within 30 days from January 29, 1930, under penalties provided in Article 9-A of the New York Tax Law.

Plaintiff is willing to pay a portion of said tax, viz: the sum of $3,095.28, being 4½% of plaintiff's net income for said period ($68,783.96) after deducting from plaintiff's gross income the said income from copyrights, as set forth in the said return and in the annexed bill of complaint, and has accordingly paid the said tax to the State Tax Commission unconditionally.

By reason of the facts hereinabove alleged irreparable loss and damage will result to the plaintiff unless a temporary restraining order be granted and remain in force until the hearing and determination of this application for an interlocutory judgment and thereafter until the trial of this action, restraining defendants from proceeding with the collection of the remainder of said tax, viz: the sum of $7,316.51, being the portion thereof computed at the rate of 4½% on plaintiff's said income from United States copyrights.

Wherefore deponent respectfully hereby applies for a temporary restraining order as aforesaid, in the form herewith submitted, and for an order requiring defendants to show cause before three judges, of whom at least one shall be a Justice of the Supreme Court or a Circuit Judge, and the other two may be either Circuit or District judges, why the collection of said tax and the enforcement, operation and execution of the aforesaid statute, and the action of the defendant officers in the enforcement and execution thereof, should not be suspended and restrained as prayed [fol. 39] for in the bill of complaint herein, and why such

Form 12 D

EXHIBIT "C"

COPY

STANDARD EXHIBITION CONTRACT

Exchange.....

AGREEMENT, made in one or more counterparts between....., a corporation (hereinafter referred to as "the Distributor"), party of the first part, and the Exhibitor hereinafter named and referred to as the "Exhibitor," operating the theatre or theatres hereinafter designated, party of the second part.

WITNESSETH:

The parties hereto agree as follows:

FIRST: The Distributor warrants that there is contained herein all of the numbered Articles of the "Standard Exhibition Contract" agreed upon by the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference (an authenticated copy of which has been filed with the American Arbitration Association). The Distributor also warrants that any clauses in addition thereto appearing upon the Schedule have been approved by such Contract Committee, and that any additional clauses appearing upon a Rider, if any hereto annexed, are not inconsistent with any of such numbered Articles. It is agreed that any clauses contained in such Rider shall be of no effect unless such Rider be signed by the Exhibitor. It is agreed that any agreement contained in the Schedule covering or describing what photoplays are licensed hereunder and in respect of any license fee, exhibition dates and any provision permitted by the provisions of the numbered Articles hereof shall not be deemed an additional clause for the purpose of this Article.

SECOND: (a) The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the Schedule herein subject to the terms and conditions hereinafter stated to exhibit (during the period of one year commencing with the date fixed or determined as hereinafter provided for the exhibition in the theatre hereinafter designated of the first photoplay deliverable hereunder, unless otherwise in the Schedule provided) each of such photoplays at the said theatre only for the number of successive days in the said Schedule provided. If more than one theatre is hereinafter designated no photoplay is licensed hereunder for exhibition at more than one of such theatres unless otherwise specifically agreed upon in the Schedule.

(b) In case any such photoplays (except photoplays which shall be "roadshown") shall not be "generally released" by the Distributor for distribution in the United States during the period beginning September, 1929, and ending September, 1930, such photoplays shall be excepted and excluded from this license unless the Exhibitor shall give written notice to the Distributor not later than thirty days after such last mentioned date that the Exhibitor elects to exhibit all such photoplays hereunder. If such notice be given, the Distributor shall deliver and the Exhibitor shall exhibit such photoplays as and when available for exhibition hereunder, except that any of such photoplays not so "generally released" within two years after such last mentioned date shall be also excepted and excluded. The Distributor may exhibit or license the exhibition of any photoplays excepted and excluded as aforesaid when and where desired by the Distributor, and all claims or causes of action in respect thereof are hereby expressly waived by the Exhibitor.

THIRD: The Exhibitor agrees to exhibit under said license said photoplays, but only at the theatre hereinafter specified, on the exhibition date or dates fixed in the Schedule or determined as hereinafter provided, and not to allow any positive print thereof to leave the Exhibitor's possession during the period specified for the exhibition thereof by the Exhibitor, nor to exhibit or to permit the exhibition of any such positive print at any other time or place. Such license shall be specifically for such exhibition of such photoplays, and for no other purpose.

FOURTH: The Exhibitor agrees to pay for such license as to each of such photoplays the fixed sums herein specified at least three (3) days in advance of the date of shipment from the Distributor's Exchange or from the last previous exhibitor of the positive print thereof.

FIFTH: Payment, if any, made upon the execution hereof by the Exhibitor shall be deemed payment on account of the sums last payable hereunder.

SIXTH: During the life of this contract the Distributor agrees not to exhibit or license the exhibition of any such photoplays in conflict with the "run" or "protection period," if any, in the Schedule specified. Unless otherwise provided herein, such "protection period" shall be computed from the last date of exhibition of each photoplay as fixed herein. If "protection" is granted hereunder against a specified theatre or theatres which "protection" shall indicate that it was the intention of the Distributor to grant such "protection" against all of the theatres in the immediate neighborhood or vicinity of the Exhibitor's theatre, then, unless otherwise provided in the Schedule, such "protection" shall be deemed to apply to and include any theatre that may hereafter be opened in such neighborhood or vicinity.

SEVENTH: The Distributor agrees to deliver to the Exhibitor during the period specified in Article Second hereof or otherwise in the Schedule provided for a positive print suitable for exhibition of each of such photoplays for exhibition at the said theatre on the dates specified or on the dates determined as herein provided. Delivery of such positive prints by the Distributor to the Exhibitor at the Distributor's exchange or to a common carrier or to the United States postal authorities for mailing or to any agent of the Exhibitor shall be deemed delivery by the Distributor to the Exhibitor hereunder.

All deliveries other than at the Distributor's exchange shall be made in time to enable the carrier thereof in accordance with the carrier's time schedule to deliver to the Exhibitor or at the place where the Exhibitor's theatre is located prints at least one hour before the usual time for the opening of the Exhibitor's Theatre.

The Exhibitor agrees to return each positive print received by the Exhibitor hereunder, with the reels and containers furnished therewith, to the exchange of the Distributor from which the Exhibitor is served or as otherwise directed by the Distributor immediately after the last exhibition of such positive print, in the same condition as when received by the Exhibitor, reasonable wear and tear due to the proper use thereof excepted. The Exhibitor agrees to pay all costs of transportation of such positive prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of any of such positive prints (as the case may be) and return to the Distributor's exchange; or if directed by the Distributor, to ship such positive prints elsewhere than to the Distributor's exchange transportation charges collect. It is agreed that the delivery of a positive print properly directed and packed in the container furnished by the Distributor therefor, to a carrier designated or used by the Distributor and proper receipt therefor obtained by the Exhibitor, shall constitute the return of such positive print by the Exhibitor.

If the Exhibitor fails to or delays the return of any positive print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor the Exhibitor agrees to pay the Distributor the damage, if any, so caused the Distributor and in addition the damage, if any, so caused such other exhibitor as shall be determined by Arbitration as provided for in Article Eighteenth hereof.

EIGHTH: The exhibition date or dates of each photoplay, unless definitely specified or otherwise provided for in the Schedule, or otherwise agreed upon, shall be determined as follows:

1. The Distributor shall mail to the Exhibitor at least fifteen days' notice in writing of the date upon which each photoplay will be available for exhibition by the Exhibitor, consistent with prior runs and/or protection heretofore or hereafter granted to other exhibitors (which date is hereinafter referred to as "the available date"). Such notice shall be of no effect unless prints of such photoplay are in the exchange of the Distributor from which the Exhibitor is served.

2. Within fourteen days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates within a thirty day period commencing with such available date, by giving written notice to the Distributor of the date, or dates, so selected.

If the exhibition date or dates so selected by the Exhibitor are not open for the Exhibitor, then the exhibition date or dates shall be designated as provided in the following paragraphs "A" and "B":

(A). If other dates within said thirty day period are open the Exhibitor shall immediately select from such other dates another date or other dates; failing to do so, then the Distributor shall designate the date or dates which shall be within a period not earlier than two weeks nor later than six weeks from the date first selected by the Exhibitor, by mailing fourteen days' notice thereof to the Exhibitor.

(B). If no other date or dates within said thirty day period are open (after the Exhibitor's written request therefor) then the Exhibitor shall designate the date or dates which shall be within a period not earlier than two, nor later than six weeks from the last date of the said thirty day period, by immediately giving written notice thereof to the Distributor. If the Exhibitor fails to immediately designate such date or dates, as provided in this paragraph "B," the Distributor shall designate the date or dates within the same period by mailing to the Exhibitor fourteen days' notice of such date or dates.

If the Exhibitor fails to make any selection within fourteen days after the mailing of the available dates of any photoplay, then the Distributor may at any time designate the exhibition date or dates thereof, which date or dates shall not be prior to the available date, by mailing notice thereof at least fourteen days before such exhibition date or dates; and if any such photoplay shall have been exhibited by any other exhibitor having a "run" prior in point of time and immediately preceding the "run" specified in the Schedule granted to the Exhibitor, then the Distributor shall designate the exhibition date or dates thereof, which shall be within a period of forty-five days commencing with the available date. In case the exhibition date or dates of any of the photoplays shall be designated by the Distributor pursuant to this paragraph, "the period of protection," if any, specified in the schedule, shall begin upon the fifteenth (15th) day of the thirty-day period specified in paragraph 2 of this article.

3. The exhibition date or dates of any of the photoplays selected by the Exhibitor (if available), or designated as in this Article Eighth provided, or otherwise agreed upon between the Distributor and the Exhibitor, shall be for all purposes the exhibition date or dates of such photoplay as though definitely specified in the Schedule.

4. In case this contract embraces a series of feature photoplays, five reels or more in length and featuring a particular star or director, the Exhibitor shall not be required hereunder to exhibit more than one photoplay of any such series every five weeks.

NINTH: The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange for each linear foot of any positive print lost, stolen or destroyed or injured in any way in the interval between the delivery thereof by the Distributor and the return thereof by the Exhibitor in full settlement of all claims for such loss, theft, destruction or injury. Such payment, however, shall not transfer title to or any interest in any such positive print to the Exhibitor or any other party, nor release the Exhibitor from liability arising out of any breach of this contract. The Distributor shall at the option of the Exhibitor repay or credit to the Exhibitor any sums paid by the latter for lost or stolen prints, excepting "news reels," upon their return to the Distributor within sixty (60) days after the date when the same should have been returned hereunder. The Exhibitor shall not be liable for the damage or destruction of any positive print, provided the Exhibitor establishes such damage or destruction occurred while in transit from the Exhibitor. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any positive print. If any positive print shall be received from the Exhibitor by the Distributor or any subsequent exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, prior to the second public exhibition thereof shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, and setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

TENTH: The Exhibitor shall not be required to accept for any photoplay described in the Schedule as the photoplay of a star, or of a director, or based upon a specified story, book or play, or by an identifying description, any other photoplay of a different star or different director, or based upon a different story, book or play, or not corresponding to such identifying description, as the case may be. Nothing herein contained shall limit the right of the Distributor to change the title of any of such photoplays, or, as respects any photoplay based upon any story, book or play, prevent the making of any alterations, changes in or adaptations thereof.

The Distributor warrants that none of the photoplays licensed hereunder are reissues from old negatives or old negatives renamed, except those specifically set forth as such in the Schedule.

ELEVENTH: This contract shall not be assigned by either party without the written acceptance of the assignee and the written consent of the other party; **provided,** that if the Exhibitor sells or disposes of his interest in the theatre hereinafter specified, he may assign this contract to the purchaser of such interest without the written consent of the Distributor and such assignment shall become effective upon the written acceptance thereof by the assignee; such assignment, however, shall not relieve the Exhibitor of liability hereunder, unless the Distributor consents in writing to release the Exhibitor from such liability.

TWELFTH: The Exhibitor agrees to run photoplays (excepting "news reels") as delivered without alteration, excepting with the written or telegraphic approval of the Distributor, subject to requirements of duly authorized public authorities necessitating any change. The exhibitor also agrees to advertise and announce each photoplay as an "Educational Picture." In all newspaper advertising and publicity issued by the Exhibitor relating to said photoplays the Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by the Distributor.

All advertising accessories used by the Exhibitor in connection with the exhibition of said photoplays must be leased from or through the Distributor and must not be sold, leased or given away by the Exhibitor.

Unless this contract expressly provides for the "first run" in the City or Town wherein the theatre hereinafter specified is located, the Exhibitor agrees not to advertise any of the photoplays herein provided for by means of lithographs, slides, trailers, lobby displays, newspaper announcements, advertising or otherwise prior to, and until after the completion of, the exhibition of such photoplay by any other exhibitor having the right of the "first run" thereof in said City or Town.

The Distributor shall not in any wise be liable for any breach of the provisions of the immediately preceding paragraph contained in any other "Standard Exhibition Contract" with any other exhibitor.

THIRTEENTH: The Distributor warrants that the photoplays herein provided for will not contain any advertising matter for which compensation is received by the Distributor.

FOURTEENTH: The Exhibitor agrees to pay to the Distributor upon demand any tax, fee or other like charge now and/or hereafter imposed or based upon the

"protection period," if any, in the Schedule specified. Unless otherwise provided herein, such "protection period" shall be computed from the last date of exhibition of each photoplay as fixed herein. If "protection" is granted hereunder against a specified theatre or theatres which "protection" shall indicate that it was the intention of the Distributor to grant such "protection" against all of the theatres in the immediate neighborhood or vicinity of the Exhibitor's theatre, then, unless otherwise provided in the Schedule, such "protection" shall be deemed to apply to and include any theatre that may hereafter be opened in such neighborhood or vicinity.

SEVENTH: The Distributor agrees to deliver to the Exhibitor during the period specified in Article Second hereof or otherwise in the Schedule provided for a positive print suitable for exhibition of each of such photoplays for exhibition at the said theatre on the dates specified or on the dates determined as herein provided. Delivery of such positive prints by the Distributor to the Exhibitor at the Distributor's exchange or to a common carrier or to the United States postal authorities for mailing or to any agent of the Exhibitor shall be deemed delivery by the Distributor to the Exhibitor hereunder.

All deliveries other than at the Distributor's exchange shall be made in time to enable the carrier thereof in accordance with the carrier's time schedule to deliver to the Exhibitor or at the place where the Exhibitor's theatre is located prints at least one hour before the usual time for the opening of the Exhibitor's Theatre.

The Exhibitor agrees to return each positive print received by the Exhibitor hereunder, with the reels and containers furnished therewith, to the exchange of the Distributor from which the Exhibitor is served or as otherwise directed by the Distributor immediately after the last exhibition of such positive print, in the same condition as when received by the Exhibitor, reasonable wear and tear due to the proper use thereof excepted. The Exhibitor agrees to pay all costs of transportation of such positive prints, reels and containers from the Distributor's exchange or the last previous exhibitor having possession of any of such positive prints (as the case may be) and return to the Distributor's exchange; or if directed by the Distributor, to ship such positive prints elsewhere than to the Distributor's exchange transportation charges collect. It is agreed that the delivery of a positive print properly directed and packed in the container furnished by the Distributor therefor, to a carrier designated or used by the Distributor and proper receipt therefor obtained by the Exhibitor, shall constitute the return of such positive print by the Exhibitor.

If the Exhibitor fails to or delays the return of any positive print to the Distributor or fails to forward or delays forwarding (as directed by the Distributor) any such print to any other exhibitor the Exhibitor agrees to pay the Distributor the damage, if any, so caused the Distributor and in addition the damage, if any, so caused such other exhibitor as shall be determined by Arbitration as provided for in Article Eighteenth hereof.

EIGHTH: The exhibition date or dates of each photoplay, unless definitely specified or otherwise provided for in the Schedule, or otherwise agreed upon, shall be determined as follows:

1. The Distributor shall mail to the Exhibitor at least fifteen days' notice in writing of the date upon which each photoplay will be available for exhibition by the Exhibitor, consistent with prior runs and/or protection heretofore or hereafter granted to other exhibitors (which date is hereinafter referred to as "the available date"). Such notice shall be of no effect unless prints of such photoplay are in the exchange of the Distributor from which the Exhibitor is served.

2. Within fourteen days after the mailing of such notice, the Exhibitor shall select an exhibition date or dates within a thirty day period commencing with such available date, by giving written notice to the Distributor of the date, or dates, so selected.

If the exhibition date or dates so selected by the Exhibitor are not open for the Exhibitor, then the exhibition date or dates shall be designated as provided in the following paragraphs "A" and "B":

(A). If other dates within said thirty day period are open the Exhibitor shall immediately select from such other dates another date or other dates; failing to do so, then the Distributor shall designate the date or dates which shall be within a period not earlier than two weeks nor later than six weeks from the date first selected by the Exhibitor, by mailing fourteen days' notice thereof to the Exhibitor.

(B). If no other date or dates within said thirty day period are open (after the Exhibitor's written request therefor) then the Exhibitor shall designate the date or dates which shall be within a period not earlier than two, nor later than six weeks from the last date of the said thirty day period, by immediately giving written notice thereof to the Distributor. If the Exhibitor fails to immediately designate such date or dates, as provided in this paragraph "B," the Distributor shall designate the date or dates within the same period by mailing to the Exhibitor fourteen days' notice of such date or dates.

If the Exhibitor fails to make any selection within fourteen days after the mailing of the available dates of any photoplay, then the Distributor may at any time designate the exhibition date or dates thereof, which date or dates shall not be prior to the available date, by mailing notice thereof at least fourteen days before such exhibition date or dates; and if any such photoplay shall have been exhibited by any other exhibitor having a "run" prior in point of time and immediately preceding the "run" specified in the Schedule granted to the Exhibitor, then the Distributor shall designate the exhibition date or dates thereof, which shall be within a period of forty-five days commencing with the available date. In case the exhibition date or dates of any of the photoplays shall be designated by the Distributor pursuant to this paragraph, "the period of protection," if any, specified in the schedule, shall begin upon the fifteenth (15th) day of the thirty-day period specified in paragraph 2 of this article.

3. The exhibition date or dates of any of the photoplays selected by the Exhibitor (if available), or designated as in this Article Eighth provided, or otherwise agreed upon between the Distributor and the Exhibitor, shall be for all purposes the exhibition date or dates of such photoplay as though definitely specified in the Schedule.

4. In case this contract embraces a series of feature photoplays, five reels or more in length and featuring a particular star or director, the Exhibitor shall not be required hereunder to exhibit more than one photoplay of any such series every five weeks.

NINTH: The Exhibitor shall pay to the Distributor a sum equal to the cost of replacement at the Distributor's exchange for each linear foot of any positive print lost, stolen or destroyed or injured in any way in the interval between the delivery thereof by the Distributor and the return thereof by the Exhibitor in full settlement of all claims for such loss, theft, destruction or injury. Such payment, however, shall not transfer title to or any interest in any such positive print to the Exhibitor or any other party, nor release the Exhibitor from liability arising out of any breach of this contract. The Distributor shall at the option of the Exhibitor repay or credit to the Exhibitor any sums paid by the latter for lost or stolen prints, excepting "news reels," upon their return to the Distributor within sixty (60) days after the date when the same should have been returned hereunder. The Exhibitor shall not be liable for the damage or destruction of any positive print, provided the Exhibitor establishes such damage or destruction occurred while in transit from the Exhibitor. The Exhibitor shall immediately notify the Distributor's exchange by telegram of the loss, theft or destruction of or damage or injury to any positive print. If any positive print shall be received from the Exhibitor by the Distributor or any subsequent exhibitor in a damaged or partially destroyed condition it shall be deemed to have been so damaged or destroyed by the Exhibitor unless the latter, prior to the second public exhibition thereof shall have telegraphed the Distributor's exchange that such print was received by the Exhibitor in a damaged or partially destroyed condition, and setting forth fully the nature of such damage and the amount of footage so damaged or destroyed.

TENTH: The Exhibitor shall not be required to accept for any photoplay described in the Schedule as the photoplay of a star, or of a director, or based upon a specified story, book or play, or by an identifying description, any other photoplay of a different star or different director, or based upon a different story, book or play, or not corresponding to such identifying description, as the case may be. Nothing herein contained shall limit the right of the Distributor to change the title of any of such photoplays, or, as respects any photoplay based upon any story, book or play, prevent the making of any alterations, changes in or adaptations thereof.

The Distributor warrants that none of the photoplays licensed hereunder are reissues from old negatives or old negatives renamed, except those specifically set forth as such in the Schedule.

ELEVENTH: This contract shall not be assigned by either party without the written acceptance of the assignee and the written consent of the other party; **provided,** that if the Exhibitor sells or disposes of his interest in the theatre hereinafter specified, he may assign this contract to the purchaser of such interest without the written consent of the Distributor and such assignment shall become effective upon the written acceptance thereof by the assignee; such assignment, however, shall not relieve the Exhibitor of liability hereunder, unless the Distributor consents in writing to release the Exhibitor from such liability.

TWELFTH: The Exhibitor agrees to run photoplays (excepting "news reels") as delivered without alteration, excepting with the written or telegraphic approval of the Distributor, subject to requirements of duly authorized public authorities necessitating any change. The exhibitor also agrees to advertise and announce each photoplay as an "Educational Picture." In all newspaper advertising and publicity issued by the Exhibitor relating to said photoplays the Exhibitor shall adhere to the form of announcement contained in the advertising matter issued by the Distributor.

All advertising accessories used by the Exhibitor in connection with the exhibition of said photoplays must be leased from or through the Distributor and must not be sold, leased or given away by the Exhibitor.

Unless this contract expressly provides for the "first run" in the City or Town wherein the theatre hereinafter specified is located, the Exhibitor agrees not to advertise any of the photoplays herein provided for by means of lithographs, slides, trailers, lobby displays, newspaper announcements, advertising or otherwise prior to, and until after the completion of, the exhibition of such photoplay by any other exhibitor having the right of the "first run" thereof in said City or Town.

The Distributor shall not in any wise be liable for any breach of the provisions of the immediately preceding paragraph contained in any other "Standard Exhibition Contract" with any other exhibitor.

THIRTEENTH: The Distributor warrants that the photoplays herein provided for will not contain any advertising matter for which compensation is received by the Distributor.

FOURTEENTH: The Exhibitor agrees to pay to the Distributor upon demand any tax, fee or other like charge now and/or hereafter imposed or based upon the delivery and/or the exhibition of positive prints of the photoplays and/or upon the sums payable under this contract by the Exhibitor to the Distributor. If under any statute or ordinance any such tax, fee or other like charge is or shall be payable or paid by the Distributor and the exact amount payable hereunder by the Exhibitor is not therein definitely fixed or cannot be exactly determined then the Exhibitor agrees to pay such part of any such tax, fee or other like charge, paid or payable by the Distributor as shall be fixed in the manner determined by the then President of the American Arbitration Association.

FIFTEENTH: The Exhibitor warrants and agrees that during the period each of the photoplays herein provided for shall be exhibited in said theatre the Exhibitor will charge for admission to said theatre an actual admission fee which shall not be less than ten cents, unless a greater minimum admission charge is herein elsewhere specified, for each exhibition and that such photoplays shall not be exhibited unless such admission fee is charged.

SIXTEENTH: In case the Exhibitor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of censor rulings, the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity or order of any Court of competent jurisdiction, then such delay or failure of performance with respect to such photoplay shall be excused and all claims or causes of action for damages therefor, or arising therefrom, are hereby expressly waived by the Distributor. In any such event, the time of the Exhibitor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, unless performance thereof because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Exhibitor with respect to any such photoplay shall be waived. The resumption of performance by the Exhibitor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance, **provided,** that if such delay and/or prevention of performance, caused as aforesaid, shall continue for a period of three (3) months either party hereto may cancel this contract, but only with respect to any such photoplay the exhibition hereunder of which has been so delayed or prevented, by sending after the expiration of such three (3) months' period to the other party notice in writing to such effect.

In case the Distributor shall be delayed in or prevented from the performance of this contract with respect to any of the photoplays herein specified by reason of the elements, accidents, strikes, fire, insurrection, acts of God, the public enemy, public calamity, Court orders, censor rulings, delays of any common carrier, or of the United States Postal authorities, delays in production or failure of the producers of any of such photoplays to make or deliver them to the Distributor or of any star or other performer to appear therein in time for delivery as herein provided, then such delay in or prevention of performance shall be excused and all claims or causes of action for damages therefor or arising therefrom are hereby expressly waived by the Exhibitor. In any such event, the time of the Distributor to perform this contract with respect to any such photoplay shall be extended for a period equal to the time of such delay, provided, however, that in case any such delay or prevention shall prevent the Distributor from "generally releasing" any such photoplay during the period specified in paragraph (b) of Article Second, the provisions of such paragraph shall govern, unless performance because of the happening of any such cause or contingency is rendered impossible, in which case performance by the Distributor with respect to any such photoplay shall be waived. The resumption of performance by the Distributor shall begin promptly after the removal or abatement of the contingencies or causes of such disability or prevention of performance and the Distributor shall deliver to the Exhibitor any such photoplay at the earliest available date thereafter, and such delivery in any such case shall be with the same force and effect as though delivery took place within the period herein above limited and the Exhibitor agrees to accept, pay for and exhibit any such photoplay at such later period pursuant to the terms hereof.

SEVENTEENTH: The waiver by either party of any breach or default by the other party shall not be construed as a waiver of any other or subsequent breach or default by such other party.

EIGHTEENTH: The parties hereto agree that before either of them shall resort to any court to determine, enforce or protect the legal rights of either hereunder, each shall submit to the Board of Arbitration (established or constituted pursuant to the Rules of Arbitration filed with the American Arbitration Association, 342 Madison Avenue, New York City, bearing date May 1, 1928, and identified by the signatures of the Contract Committee appointed at the 1927 Motion Picture Trade Practice Conference, a copy of which will be furnished to the Exhibitor upon request) in the city wherein is situated the exchange of the Distributor from which the Exhibitor is served or if there be no such Board of Arbitration in such city then to the Board of Arbitration in the city nearest thereto (unless the parties hereto agree in writing that such submission shall be made to a Board of Arbitration located in another specified city), all claims and controversies arising hereunder for determination pursuant to the said Rules of Arbitration and the rules of procedure and practice adopted by such Board of Arbitration.

The parties hereto further agree to abide by and forthwith comply with any decision and award of such Board of Arbitration in any such arbitration proceeding, and agree and consent that any such decision or award shall be enforceable in or by any court of competent jurisdiction pursuant to the laws of such jurisdiction now or hereafter in force; and each party hereto waives the right of trial by jury upon any issue arising under this contract, and agrees to accept as conclusive the findings of fact made by any such Board of Arbitration, and consents to the introduction of such findings in evidence in any judicial proceeding.

In the event that the Exhibitor shall fail or refuse to consent to submit to arbitration any claim or controversy arising under this or any other Standard Exhibition Contract which the Exhibitor may have with the Distributor or any other distributor or to abide by and forthwith comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, the Distributor may, at its option, demand, for its protection and as security for the performance by the Exhibitor of this and all other existing contracts between the parties hereto, payment by the Exhibitor of an additional sum not exceeding $500 under each existing contract, such sum to be retained by the Distributor until the complete performance of all such contracts and then applied, at the option of the Distributor, against any sums finally due or against any damages determined by said Board of Arbitration to be due to the Distributor, the balance, if any to be returned to the Exhibitor; and in the event of the Exhibitor's failure to pay such additional sum within seven (7) days after demand, the Distributor may by written notice to the Exhibitor suspend service hereunder until said sum shall be paid and/or terminate this contract.

In the event that the Distributor shall fail or refuse to consent to the submission to arbitration of any claim or controversy arising under this or any other Standard Exhibition Contract providing for arbitration which the Distributor may have with the Exhibitor, or to abide by and forthwth comply with any decision or award of such Board of Arbitration upon any such claim or controversy so submitted, within the number of days specified in Article Twenty-Second opposite the name of the City in with such Board of Arbitration is located, the Exhibitor may at his option terminate this and any other existing contract between the Exhibitor and the Distributor by mailing notice by registered mail within two (2) weeks after such failure or refusal, and in addition the Distributor shall not be entitled to redress from such Board of Arbitration upon any claim or claims against any exhibitor until the Distributor shall have complied with such decision, and in the meanwhile the provsions of the first paragraph of this Article Eighteenth shall not apply to any such claim or claims.

Any such termination by either party, however, shall be without prejudice to any other right or remedy which the party so terminating may have by reason of any such breach of contract by the other party.

The provisions of this contract relating to arbitration shall be construed according to the law of the State of New York.

NINETEENTH: This Contract is complete and no promises or representations have been made by either party to the other except as set forth herein.

TWENTIETH: If the license herein granted shall apply to an entire group of photoplays offered by the Distributor to the Exhibitor at one time, and not otherwise, the Exhibitor shall have the right to exclude from this contract up to but not exceeding ten per cent of the total number of such photoplays, but only if the Exhibitor shall give the Distributor written notice to such effect at any time not later than fourteen (14) days before the date fixed for the exhibition of any such photoplay hereunder, and if at the same time the Exhibitor shall pay to the Distributor one-half of the license fee payable in respect of any such photoplay. In computing such ten per cent, fractions of less than one-half shall be disregarded. If any such photoplay shall, because of such exclusion, be thereafter licensed by the Distributor for the same run as that specified in this contract, for exhibition at another theatre where such excluded photoplay would not have been exhibited if not so excluded; then one-half of the license fee (up to but not exceeding the amount paid by the Exhibitor to the distributor as a condition of so excluding such photoplay) received by the Distributor for such re-license, shall be credited to the Exhibitor by the Distributor.

If the license fee for any such photoplay so excluded is to be computed either in whole or in part upon a percentage of gross receipts of the Exhibitor's theatre, then for the purpose of computing such one-half of such license fee payable hereunder in respect of such photoplay, such gross receipts for each day that any such photoplay is licensed hereunder for exhibition thereat shall be deemed to be the average daily gross receipts of such theatre during the period of thirty (30) operating days immediately prior to such date of availability of such photoplay.

TWENTY-FIRST: If the Exhibitor shall claim that the exhibition at the theatre hereinafter specified of any photoplay licensed hereunder will be offensive to the public in the place where such theatre is located, because of racial or religious subject matter, and if the Exhibitor shall give written notice to the Distributor of such claim within a reasonable time prior to the date fixed for the Exhibition thereof hereunder such claim shall be immediately submitted to the Board of Arbitration herein specified. If such Board of Arbitration shall specifically determine that the exhibition of such photoplay at such theatre will be offensive to said public because of racial or religious subject matter, then such photoplay shall be excepted from this contract, and not otherwise. The Distributor may exhibit or license the exhibition of any photoplay so excepted when and where desired by the Distributor free from all claims of the Exhibitor.

If the Distributor shall be of the opinion that any photoplay licensed hereunder will be offensive because of racial or religious subject matter, to th epublic in the place where the Exhibitor's theatre is located, the Distributor shall have the right to except and exclude such photoplay from this contract, upon condition that such photoplay shall not thereafter be licensed for exhibition in such place unless such racial or religious subject matter is eliminated therefrom in which case such photoplay shall again be deemed licensed hereunder.

TWENTY-SECOND: This instrument shall be deemed an application for a license under copyright only and shall not become binding until accepted in writing without alteration or change by an officer of or any person duly authorized by the Distributor and notice of acceptance sent to the Exhibitor as herein provided. The deposit by the Distributor of any check or other consideration given by the Exhibitor at the time of application as payment on account of any sums payable hereunder or the delivery of a print of any of the photoplays or the furnishing of any advertising accessories shall not be deemed an acceptance hereof by the Distributor.

Unless notice of acceptance of this application by the Distributor is sent to the Exhibitor by mail or telegraph within the number of days after the date thereof hereinafter specified (immediately following the name of the city wherein is situated the exchange of the Distributor from which the Exhibitor is served, or if such city is not hereinafter named then within the number of days specified immediately following the city hereinafter named nearest thereto) sai. application shall be deemed withdrawn and the Distributor shall forthwith return any sums paid on account thereof by the Exhibitor. Albany 10; Atlanta 20; Boston 10; Buffalo 10; Charleston 15; Charlotte 15; Chicago 15; Cincinnati 20; Cleveland 15; Dallas 30; Denver 20; Des Moines 15; Detroit 15; Indianapolis 15; Jacksonville 15; Kansas City 15; Los Angeles 25; Little Rock 15; Louisville 15; Memphis 20; Milwaukee 15; Northern New Jersey 7; Minneapolis 20; Butte 30; New Haven 10; New Orleans 15; New York City 7; Oklahoma City 20; Omaha 20; Peoria 15; Philadelphia 10; Pittsburgh 14; Portland, Ore., 30; St. Louis 15; Salt Lake City 30; San Francisco 20; Seattle 30; Washington, D. C., 14.

This application and any application for other photoplays of the Distributor executed by the Exhibitor at the same time shall, for the purpose of this Article only, be deemed one application unless an agreement to the contrary contained in the Schedule is specifically signed by the Exhibitor.

A copy of this application, signed by the Exhibitor, shall be left with the Exhibitor at the time of signing, and in the event of acceptance thereof as above provided, a duplicate copy, signed by the Distributor, shall be forwarded to the Exhibitor.

SCHEDULE FOR RELEASES OF DISTRIBUTOR'S SERIES.....

IT IS AGREED THAT THE EXHIBITOR SHALL, BEGINNING.....19....., OR WITH THE FIRST PLAY DATE DETERMINED AS HEREIN PROVIDED, EXHIBIT AND/OR PAY FOR ALL THE.....PHOTOPLAYS SPECIFIED BELOW, AS FOLLOWS:.....PHOTOPLAY....EVERY.....WEEK.....

Brand Contract No.	No. of Pictures	TITLE OR BRAND	Rental for ——Day Per Release	Rental for ——Day Per Release	Rental Each Additional Day Per Release
		MACK SENNETT			
		CORONET			
		LLOYD HAMILTON			
		JACK WHITE			
		LUPINO LANE			
		MERMAID			
		TUXEDO			
		JAZZ MAMAS			
		HODGE PODGE			
		RUNAWAY TRAIN			

RUN .....

PROTECTION .....

END OF SCHEDULE

RIDER FOR SOUND PICTURES

FIRST: "Recorded Sound" as used herein shall be deemed to mean the spoken words, music, or other sounds recorded upon the positive print of a photoplay or upon a record, disc or other similar devices, separate and apart from a positive print, for use in synchronism therewith.

SECOND: The Distributor grants to the Exhibitor and the latter accepts a license under the respective copyrights of the photoplays specified in the Schedule for which sound is recorded, and/or under any copyright which may be in force with respect to any matter included in such recorded sound, to reproduce such recorded sound in synchronism with the exhibition of said photoplays, but only at the theatre designated in the license to which this Rider is attached, and for the number of

cago 15; Cincinnati 20; Cleveland 15; Dallas 30; Denver 20; Des Moines 15; Detroit 15; Indianapolis 15; Jacksonville 15; Kansas City 15; Los Angeles 25; Little Rock 15; Louisville 15; Memphis 20; Milwaukee 15; Northern New Jersey 7; Minneapolis 20; Butte 30; New Haven 10; New Orleans 15; New York City 7; Oklahoma City 20; Omaha 20; Peoria 15; Philadelphia 10; Pittsburgh 14; Portland, Ore., 30; St. Louis 15; Salt Lake City 30; San Francisco 20; Seattle 30; Washington, D. C., 14.

This application and any application for other photoplays of the Distributor executed by the Exhibitor at the same time shall, for the purpose of this Article only, be deemed one application unless an agreement to the contrary contained in the Schedule is specifically signed by the Exhibitor.

A copy of this application, signed by the Exhibitor, shall be left with the Exhibitor at the time of signing, and in the event of acceptance thereof as above provided, a duplicate copy, signed by the Distributor, shall be forwarded to the Exhibitor.

SCHEDULE FOR RELEASES OF DISTRIBUTOR'S SERIES.....

IT IS AGREED THAT THE EXHIBITOR SHALL, BEGINNING.....19....., OR WITH THE FIRST PLAY DATE DETERMINED AS HEREIN PROVIDED, EXHIBIT AND/OR PAY FOR ALL THE.....PHOTOPLAYS SPECIFIED BELOW, AS FOLLOWS:.....PHOTOPLAY....EVERY.....WEEK.....

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		TUXEDO			
		JAZZ MAMAS			
		HODGE PODGE			
		RUNAWAY TRAIN			

RUN .....

PROTECTION .....

END OF SCHEDULE

RIDER FOR SOUND PICTURES

FIRST: "Recorded Sound" as used herein shall be deemed to mean the spoken words, music, or other sounds recorded upon the positive print of a photoplay or upon a record, disc or other similar devices, separate and apart from a positive print, for use in synchronism therewith.

SECOND: The Distributor grants to the Exhibitor and the latter accepts a license under the respective copyrights of the photoplays specified in the Schedule for which sound is recorded, and/or under any copyright which may be in force with respect to any matter included in such recorded sound, to reproduce such recorded sound in synchronism with the exhibition of such photoplays, but only at the theatre designated in the license to which this Rider is attached, and for the number of successive days in the Schedule specified.

THIRD: This license to so reproduce such recorded sound is granted upon the Exhibitor's warranties and conditions as follows: (a) that the sound reproducing equipment installed in said theatre will operate reliably and efficiently to reproduce such recorded sound, with adequate volume and high quality, whether recorded upon the positive print or upon records, discs or other similar devices; and (b) that if copyrighted musical compositions are included in such recorded sound, the Exhibitor shall, at the time of the exhibition of such photoplays and the reproduction of such recorded sound, have an effective license from the American Society of Authors, Composers and Publishers publicly to perform the copyrighted musical compositions in the repertoire of said Society.

FOURTH: The Exhibitor agrees: (a) to return all sound records, discs or other similar devices, if any have been delivered to Exhibitor hereunder, and all parts thereof if damaged or broken, immediately following the last exhibition of the photoplay with which such sound records are used; and (b) if such recorded sound is recorded on records, discs or other similar devices, to replace with black blank positive stock, all parts removed from the positive print of any photoplay while in the Exhibitor's possession, but the Exhibitor shall have no right to remove any part of the positive print except as specifically authorized in the license to which this Rider is attached.

FIFTH: All of the provisions of the license to which this Rider is attached shall be deemed incorporated herein as if fully set forth, except that for the purposes of this Rider only, there shall be substituted for the words "photoplays" and "positive prints" the words "records, discs or other similar devices" (if any are produced and delivered), and there shall be substituted for the words "exhibition" and "exhibit" the words "reproduction" and "reproduce," where the context permits; and it is agreed that all claims and controversies arising hereunder shall be submitted for determination by arbitration, as provided in Article EIGHTEENTH of the said license.

SIXTH: The Distributor does not warrant that such recorded sound will be recorded on the positive print or on records, discs or other similar devices, the Distributor reserving the right to use any one or more methods of recording it may from time to time determine.

IN WITNESS WHEREOF, the parties hereto have duly executed this Rider.

.....
Distributor.

.....
Exhibitor.

END OF RIDER

IN WITNESS WHEREOF the Distributor above named and.....the Exhibitor operating.....days each week with.....changes of program the.....Theatre, located at ..... in .....State of..... have executed this instrument, the.....day of.....19....., which upon acceptance by the Distributor shall be deemed to be the license to the Exhibitor for the exhibition of the photoplays specified in the Schedule in accordance with the terms hereof.

Accepted (Date)

.....
EDUCATIONAL FILM EXCHANGES, INC.

.....
Distributor

.....
Exhibitor

Branch..... Salesman.....

*DIRECTION TO SALESMEN: While you have every right to trade among prospective customers to obtain the best offer possible for your product, after you have selected a particular exhibitor whose offer you believe to be the best obtainable and take a written application from such exhibitor, you are hereby directed to forward the application to the office of your company and make no further effort to sell the same service to any other exhibitor directly competing with such exhibitor until the application so forwarded has been duly rejected, accepted or withdrawn in accordance with its terms. A violation of this direction will subject you to discharge.

*(Note: This direction to Salesmen shall be printed upon but shall not be deemed a part of the Standard Exhibition Contract.)

Franchise Commission based on and measured by plaintiff's income from its copyrights of the United States of America is violative of plaintiff's rights under the United States Constitution, as declared by the United States Supreme Court in the case of Long v. Rockwood, 277 U. S. 142; and Macallen v. Commonwealth of Massachusetts, U. S. Supreme Court No. 578, May 27, 1929, rehearing denied October 14, 1929.

I have also advised plaintiff, and verily believe, that the statutes of New York State do not provide any adequate remedy at law (or indeed any remedy at all available in the federal courts) for the hearing and determination of plaintiff's constitutional rights before the payment of said tax, or for the recovery back of said tax after it has been paid.

As will further appear in the bill of complaint and annexed affidavit of Dario L. Faralla, plaintiff, under oath, has already submitted under oath to the State Tax Commission the facts upon which its claim of violation of constitutional right is based, viz: the fact that its income for the period in question included to the extent of $162,588.98 income from copyrights of the United States owned by said plaintiff taxpayer and has in the most formal manner asserted its said constitutional rights to have said income excluded in computing its franchise tax based upon its income; and that nevertheless despite said facts and said assertion of constitutional right, the State Tax Commission has overruled said objection and proceeded to assess a tax of $10,411.79, of which only $3,095.28 is computed (at the [fol. 45] rate of 4½%) upon plaintiff's other income (not derived from United States copyrights) and the sum of $7,316.51, the amount in dispute, is computed upon said income from copyrights at the rate of 4½%.

Moreover, in correspondence which I have had with said State Tax Commission the Commission has manifested a fixed purpose to overrule, and to continue to overrule, the aforesaid constitutional objection, until that precise question has been decided by the United States Supreme Court, and has heretofore not granted any hearing to any of the several taxpayers similarly situated who have voluntarily paid their taxes and demanded hearings before said State Tax Commission as a condition precedent to applying for

relief, by certiorari to the New York Supreme Court, Appellate Division, Third Department.

I have accordingly advised plaintiff, and verily believe, that in view of the aforesaid facts and as determined in the clearest possible manner by the Supreme Court of the United States, (and as particularly set forth in the bill of complaint) the remedy available to the plaintiff under the statutes and procedure afforded by the State of New York is inadequate, and that there is no remedy at law whatsoever available to the plaintiff in the federal courts, either of which is sufficient to entitle plaintiff to the injunctive relief herein prayed for.

Plaintiff is, upon information and belief, financially responsible, and I assume that assertion will not be challenged by defendants. Plaintiff has already paid the sum of $3,095.28, representing the portion of the tax which is not in dispute., and, if required by the Court, is willing to file a bond of an authorized surety company conditioned [fol. 46] upon the payment of the amount of tax in dispute, together with legal interest thereon.

Plaintiff therefore prays for an order, pursuant to Section 380 of the United States Code of Laws (formerly Section 266 of the Judicial Code) containing a temporary restraining order, and requiring defendant to show cause before a court of three judges why the said restraint should not be continued during the pendency of this action.

Plaintiff intends to prosecute this action with the utmost diligence, and I believe that it is a foregone conclusion that the losing party will in any event appeal directly to the United States Supreme Court, so that this important constitutional question may be conclusively disposed of.

No previous application has been asked for the relief herein prayed for.

Roger Hinds.

Sworn to before me this 18th day of February, 1930. Mary E. Lee, Notary Public, Queens County. Co. Cl'k's No. 3309, Reg. No. 3871. N. Y. Co. Cl'k's No. 890, Reg. No. O-592. Kings Co. Cl'k's No. 208, Reg. No. 495A. Commission expires March 30, 1930.

other and further relief as may be just in the premises should not be granted.

No previous application has been made for the relief herein prayed for.

Dario L. Faralla.

Sworn to before me this 15th day of February, 1930. Bernard J. Kearney, Notary Public, New York County. New York County Clerk's No. 66. New York Co. Register's No. O-18. Term expires March 30, 1930.

[fol. 40] EXHIBIT "C" TO AFFIDAVIT OF FARALLA

(Here follows exhibit, side folios 41 and 42)

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF ROGER HINDS

SOUTHERN DISTRICT OF NEW YORK,
City, County and State of New York, ss:

Roger Hinds, being duly sworn, upon his oath deposes and says:

I am a member of the bar of the States of New York and New Jersey, of the United States Supreme Court, of the United States District Courts for the Southern and Eastern Districts of New York, and of the Circuit Court of Appeals for the Second and Third Circuits, and am solicitor for the above named plaintiff and familiar with the matters embraced in the bill of complaint herein.

There are associated with me as counsel in this matter Benjamin B. De Witt, Esq. and Siegfried Hartman, Esq. of New York City.

[fol. 44] After the fullest investigation into the law and facts in this case, and after extended consultation with said counsel, I have advised plaintiff herein, and verily believe, that the threatened tax assessed by the New York State

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING BILL OF COMPLAINT

Plaintiff having duly applied for permission to amend its bill of complaint so as to substitute as one of the defendants comprising the New York State Tax Commission, the name of Thomas M. Lynch instead of his predecessor M. F. Loughman, and no suppœna having as yet been served upon any of the defendants, or any temporary restraining order as yet made herein, it is, on motion of Roger Hinds, solicitor for plaintiff,

Ordered that the bill of complaint be and the same is hereby amended so as to substitute the name of Thomas M. Lynch for that of his predecessor M. F. Loughman in the caption and in paragraph 4 of said bill, as one of the [fol. 48] defendants comprising the New York State Tax Commission, and that the subpœna herein be similarly amended.

Dated at New York, N. Y., this 21st day of February, 1930.

Wm. Bondy, Judge of the United States District Court for the Southern District of New York.

[fol. 49] IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE AMENDMENT OF BILL OF COMPLAINT

It is hereby stipulated, by and between the respective parties to the above entitled suit, by their respective solicitors, and subject to the approval of the Court, as follows:

I. That the bill of complaint herein be amended as follows:

(a) By adding to paragraph 6th of the bill of complaint the following allegation: "That of the aforesaid deductions, $49,151.37 consisted of plaintiff's expenses in pro-

curing the aforesaid income of $168,588.98 from copyright royalties".

(b) By adding to paragraph 14th of the bill of complaint the following allegation: "That after the commencement of this suit the State Tax Commission offered to give plaintiff [fol. 50] a hearing and a hearing has accordingly been had, and the State Tax Commission has announced that it will affirm the aforesaid assessment."

(c) That the bill of complaint shall be further amended by striking therefrom any allegations inconsistent with the foregoing amendments.

II. That the defendants shall be deemed to have made a cross motion for the dismissal of said bill of complaint, as so amended, upon the ground that the same does not state facts sufficient to constitute a cause of action, and that the said cross motion shall be deemed to have been submitted to this Court, notice of such cross motion being expressly waived.

III. That the defendants' time within which to file and serve its brief upon the plaintiff's motion for an interlocutory injunction herein and upon the defendants' motion to dismiss the said complaint, be extended to and including the 24th day of March 1930, and the plaintiff's time within which to reply thereto be extended to and including the 31st day of March 1930.

IV. That any party may enter an order on this stipulation without notice.

Dated March 14, 1930.

Roger Hinds, Solicitor for Plaintiff. Hamilton Ward, Attorney General of the State of New York, Solicitor for Defendants.

[fol. 51] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER AMENDING BILL OF COMPLAINT

The parties hereto, by their respective solicitors, having, subject to the approval of the Court, entered into the an-

nexed stipulation dated the 14th day of March, 1930, it is hereby

Ordered that the bill of complaint be and the same is hereby amended as follows:

(a) By adding to paragraph 6th of the bill of complaint the following allegation: "That of the aforesaid deductions, $49,151.37 consisted of plaintiff's expenses in procuring the aforesaid income of $168,588.28 from copyright royalties".

(b) By adding to paragraph 14th of the bill of complaint the following allegation: "That after the commencement of this suit the State Tax Commission offered to give plaintiff a hearing and a hearing has accordingly been had, and [fol. 52] the State Tax Commission has announced that it will affirm the aforesaid assessment."

(c) By striking therefrom any allegations inconsistent with the foregoing amendments.

and it is further

Ordered that the defendants shall be deemed to have made a cross motion for the dismissal of said bill of complaint, as so amended, upon the ground that the same does not state facts sufficient to constitute a cause of action, and that the said cross motion shall be deemed to have been submitted to this Court, notice of such cross motion being expressly waived; and it is further

Ordered that the defendants' time within which to file and serve its brief upon the plaintiff's motion for an interlocutory injunction herein and upon the defendants' motion to dismiss the said complaint, be extended to and including the 24th day of March, 1930, and the plaintiff's time within which to reply thereto be extended to and including the 31st day of March, 1930.

Dated New York, N. Y., this 25th day of March, 1930.

Harrie B. Chase, U. S. Circuit Judge. W. M. Bondy, U. S. D. J. Woolsey, U. S. District Judge.

[fol. 53] In United States District Court for the Southern District of New York

Educational Films Corporation of America, Plaintiff,

against

Hamilton Ward, Attorney General of the State of New York, and Thomas M. Lynch, John H. Merrill, and Mark Graves, Comprising the New York State Tax Commission, Defendants

Before Chase, Circuit Judge; Bondy and Woolsey, District Judges

Convened pursuant to Sec. 266 of the Judicial Code (28 U. S. C. A. Sec. 380).

Opinion

In this action brought and heard by virtue of U. S. Code Title 28 Sec. 41 (1), the plaintiff is seeking to have the defendants enjoined from collecting that part of the franchise tax assessed against it for the year ending October 31, 1930, under and by virtue of Article 9-A the New York Tax Law, which results from using any of the plaintiff's income derived from copyrights as a measure of the tax. Its contention is that the law so uses copyright income in violation of the Federal constitution. The applicable portions of Article 9-A of the New York law providing for a franchise tax on business corporations follow:

[fol. 54] "Sec. 209. Franchise Tax on Corporations Based on Net Income. For the privilege of exercising its franchise in this State in a corporate or organized capacity every domestic corporation, * * * shall annually pay in advance for the year beginning November first next succeeding the first day of July in each and every year an annual franchise tax, to be computed by the tax commission upon the basis of its entire net income, as defined in subdivision three of section two hundred and eight of the tax law, for its fiscal or the calendar year next preceding, as hereinafter provided, which entire net income is presumably the same as the entire net income which such corporation is required to report to the United States, plus any income

received as dividends on stocks or any interest received on bonds of any character * * *.

Section 208, subdivision 3 (referred to in Section 209, supra), so far as material here, provides as follows:

"3. The term 'entire net income' means the total net income, including all dividends received on stocks and all interest received from federal, state, municipal or other bonds * * *."

Section 211, so far as material here, provides as follows:

"Reports of Corporations to Tax Commission.—Every corporation taxable under this article * * * shall annually on or before July first, or within thirty days after the making of its report of entire net income to the United States treasury department for any fiscal or calendar year, preceding said first day of July, transmit to the tax commission a report in the form prescribed by the tax commission, specifying:

* * * * * * *

"2. The amount of its entire net income for its preceding fiscal or the preceding calendar year as provided by subdivision three of section two hundred and eight of the tax law * * *. If the corporation shall claim that the return made to the United States treasury department was inaccurate, the amount claimed by it to be the net income for such period shall be specified * * *."

Section 215 provides:

"Rate of Tax.—The tax imposed by this article shall be at the rate of four and one-half per centum of the entire net income of the corporation * * * determined as provided by this article * * *."

[fol. 55] At the hearing, it appeared that the plaintiff had not, before bringing this suit applied to the New York State Tax Commission for a revision of the assessment. Since then the parties have by leave of Court filed a stipulation showing that a hearing has been had before the Commission and the assessment affirmed. The bill of complaint has been amended and, as amended, is attacked by the de-

fendants' motion to dismiss on the ground that it fails to state a cause of action.

The facts are not in dispute. The plaintiff is a domestic business corporation subject to be taxed under the New York law if the tax is constitutional. Its income during the year in question consisted in part of $162,588.98 derived solely from copyrights granted by the United States on motion picture films. Its expenses in procuring this part of its income were $49,151.37 leaving its net copyright income $113,437.61. These copyrights were not all held in the name of the plaintiff, some being in its name and some in the names of affiliated corporations, but all were owned by the plaintiff and it received the income therefrom. It bases this suit solely on the ground that to measure its franchise tax by any part of its copyright income is in effect taxing income from a federal instrumentality which is beyond the reach of state taxation.

Roger Hinds, Esq., Solicitor for Plaintiff. Benjamin P. DeWitt, Siegfried F. Hartman and Roger Hinds, of counsel.

[fol. 56] Hamilton Ward, Esq., Attorney General, Solicitor for Defendants. Wendell P. Brown, Esq., Third Assistant Attorney General, of Counsel.

CHASE, Circuit Judge:

The power of a State to impose a tax on the franchise of a corporation doing business therein is too well established for discussion. Kansas City, Fort Scott and Memphis Ry. Co. v. Botkin, 240 U. S. 227, 232, and it is equally well settled that, except under conditions discussed below, the net income of a corporation may be used to measure a tax on the privilege of doing business in corporate form even though such income does in part come from property exempt from taxation by the same taxing power, Flint v. Stone Tracy Co., 222 U. S. 107; that the excess of the market value of capital stock over the value of certain specified property behind it may be used by a state as the measure of the tax although the market value was enhanced by United States bonds held by the corporation, Hamilton Company v. Massachusetts, 6 Wall. 632; that a state may tax the franchise of a savings bank and use as the measure a percentage of

its deposits on a day certain though part of such deposits were actually then invested in tax exempt federal securities, Society for Savings v. Coite, 6 Wall. 594; see also Provident Institution for Savings v. Massachusetts, 6 Wall. 611; that the tax may be measured by dividends made or [fol. 57] declared although such dividends had their source in part in capital invested in United States bonds; Home Insurance Co. v. New York, 134 U. S. 594; that it may be measured by the amount of paid-up capital stock which may represent in part non-taxable property, Kansas City etc., v. Botkin, supra. In United States Glue Co., v. Town of Oak Creek, 247 U. S. 321, 328 it was held that income derived from interstate commerce might be directly reached under an income tax law which did not discriminate against such commerce. See also, Hump Hairpin Co. v. Emmerson, 258 U. S. 290; Underwood Typewriter Co., v. Chamberlain, 254 U. S. 113, 120; and International Shoe Company v. Shartel, 279 U. S. 429. State inheritance taxes were held to be lawfully measured by including the value of United States bonds in Blodgett v. Silberman, 277 U. S. 1, 12; and in Plummer v. Coler, 178 U. S. 115 a legacy tax on a bequest consisting wholly of United States bonds was upheld. See Orr v. Gilman, 183 U. S. 278.

Since Long v. Rockwood, 277 U. S. 142, however, it cannot be thought a state may tax directly income from patents or copyrights. While a copyright is not such a federal instrumentality as is a bond, for instance, sold for the purpose of raising funds for the support of government itself, it results from the exercise of a right or privilege to grant copyrights, given exclusively to the United States by [fol. 58] the constitution, and the value to the government of this right or privilege may not be lessened or destroyed by taxation imposed by a state upon the thing created through federal enjoyment of this exclusive privilege.

In Northwestern Mutual Life Insurance Co., v. Wisconsin, 275 U. S. 136 a tax was held invalid because it was in effect imposed upon exempt property, rather than upon the franchise, of the corporation by making the measure of the tax gross returns rather than net receipts. The substantial distinction between these two methods was noted and will be found pointed out at some length in United States Glue Co., v. Oak Creek, Supra, at 328-9. In Gillespie v. Okla-

homa, 257 U. S. 501, income from oil leases on Indian lands was held non-taxable directly as income because the principal was absolutely exempt but no question of the measure of a privilege or excise tax was involved; and in Panhandle Oil Co. v. Mississippi, 277 U. S. 218, it was held that to tax a dealer selling gasoline upon the number of gallons sold and to include therein gasoline purchased by the United States was in effect a tax upon a Federal Government by so much as the cost to it of gasoline so purchased was increased. Yet this case involved a tax on "any person engaged in the business of distributing gasoline" and stands, like the two just previously mentioned, as one where measuring a corporate franchise tax by net income was not in issue.

[fol. 59] It cannot be doubted that this tax is not directly on income but is purely an excise. Speaking of this very statute, in People ex rel. Bass, Ratcliff & Gretton, Ltd., v. State Tax Commission, 266 U. S. 271, on a point quite apart from the issue now presented, after agreeing with the New York Court of Appeals that the tax is "primarily a tax levied for the privilege of doing business in the State" it is said that, "It is not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from business in the preceding year. See New York v. Jersavit, 263 U. S. 493, 496."

Were it not for Macallen v. Massachusetts, 279 U. S. 620, we should have no hesitation in reaching the conclusion that in imposing this tax a constitutionally permissible method of measurement has been used. And that decision, though much relied upon by the plaintiff, does not seem to change the general principle developed in the decisions above referred to but tends to mark the limits of what is mere casual effect upon tax exempt property which will be tolerated in recognizing and trying to overcome the practical difficulties confronting two governments, State and Nation, in raising revenue within the same geographical area.

[fol. 60] It is urged that the same situation is presented here as was in the Macallen case but we think not. After the New York Court of Appeals in People ex rel. Standard

Oil Company v. Law et al., 237 N. Y. 142, held in 1923 that gross income from which deductions were to be made for purposes of state corporate franchise taxation was the same as gross income determined in accordance with the federal law and included no interest on federal securities which were within the exception of "subdivision 4 of Sect. 213 (b)" (U. S. C. A. Title 26 Sec. 554 (b)) the legislature in April 1924, amended the law by adding, inter alia, in Sec. 2090 Chapter 329 the words "plus * * * any interest received on bonds of any character". Again in 1927, the law was amended to "include income from any source, provided only that assets from which the income arose shall be included in any segregation for the purpose of computing the tax". We think it now beside the point that the New York law as amended may, in so far as interest on federal bonds is concerned, be the result of motives not unlike those responsible for the Massachusetts law held invalid in the MacAllen case. That question is not before us. Copyright income was not excluded from gross income in the exception in the federal law referred to in People ex rel. Standard Oil Company v. Law et al., supra. Now, as before, it enters into the measure of the franchise tax purely as a casual incident of that tax. Ac-
[fol. 61] cordingly we have reached the conclusion that this bill of complaint states no cause of action.

Injunction denied and bill dismissed.

[fol. 62] In United States District Court for the Southern District of New York

In Equity. No. E 52-72

Educational Films Corporation of America, Plaintiff,

against

Hamilton Ward, Attorney General of the State of New York, and Thomas M. Lynch, John J. Merrill, and Mark Graves, Comprising the New York State Tax Commission, Defendants

DECREE DENYING INJUNCTION AND DISMISSING BILL

This case came on to be heard on the 8th day of March, 1930, on plaintiff's motion, by order to show cause, for interlocutory injunction herein and on defendants' motion to dismiss the bill of complaint, before Honorable William Bondy, District Judge, and Honorable Harrie B. Chase, Circuit Judge, and Honorable John M. Woolsey, District Judge, whom he called to his assistance, pursuant to Section 380 of the United States Code of Laws, and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill of complaint of the plaintiff herein filed on the 18th day of February, 1930, as amended by orders entered herein on the 21st day of February and the 26th day of March, 1930, be and the same hereby is dismissed upon the merits, and plaintiff's application for interlocutory injunction herein is hereby denied, and that plaintiff shall pay to the defendants herein their costs and disbursements to be taxed by the Clerk and [fol. 63] that they have execution therefor.

Dated New York, June 10, 1930.

Harrie B. Chase, U. S. Circuit Judge. Wm. Bondy, U. S. District Judges.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME

The above-named plaintiff Educational Films Corporation of America, conceiving itself aggrieved by the final decree made and entered in the above entitled case on the 10th day of June, 1930, dismissing, upon the merits, the bill of complaint here, as amended, and denying the plaintiff's application for interlocutory injunction herein, does hereby petition for an appeal from said decree and each and every part thereof to the Supreme Court of the United States, and it prays that this, its appeal, may be allowed and that a transcript of the record of proceedings

and papers upon which said decree was made, duly authenticated, may be transmitted to the Supreme Court of the United States.

Dated: New York, N. Y., July 18, 1930.

Roger Hinds, Solicitor for Plaintiff. Office & P. O. address: 165 Broadway, Borough of Manhattan, New York City.

The foregoing appeal is hereby allowed this 18 day of July, 1930, upon filing of a bond of costs in the sum of $250.00.

William Bondy, United States District Judge.

A. G., Jr.

[fol. 65] In United States District Court

[Title omitted]

Assignment of Errors

Now comes Educational Films Corporation of America, the above-named plaintiff, appellant herein, and assigns the following errors, namely:

1. That the United States District Court erred in denying plaintiff's application for an interlocutory injunction herein.

2. That the said United States District Court erred in granting the motion of the defendants to dismiss the bill of complaint herein as amended, and in dismissing the same.

3. That the said United States District Court erred in entering a decree denying plaintiff's application for an interlocutory judgment herein and dismissing the bill of complaint herein as amended.

4. That the said United States District Court erred in holding and deciding that Article 9A of the New York Tax Law, in so far at it attempts to include in the measure of the tax provided therein, income received by plaintiff [fol. 66] from copyrights of the United States is not in

contravention and violation of the Constitution of the United States and particularly Section 8 of Article 1 thereof, as imposing a state tax upon income from an instrumentality of the United States and upon means employed by Congress to carry into effect the powers conferred upon it by the Constitution.

5. That the said United States District Court erred in holding and deciding that the collection of the tax of $7,316.51 imposed pursuant to Article 9A of the New York Tax Law threatened by the defendants comprising the New York State Tax Commission and measured by plaintiff's income in so far as the same includes income from copyrights of the United States should not be enjoined during the pendency of this suit, and permanently, as in violation of plaintiff's rights under the Constitution of the United States and particularly Section 8 of Article 1 thereof.

Wherefore plaintiff prays that the said decree be reversed and that the said United States District Court be directed to grant the relief prayed for in plaintiff's bill of complaint and petition of appeal herein.

Roger Hinds, Solicitor for Plaintiff-Appellant.
Benjamin P. De Witt, Siegfried F. Hartman, Roger Hinds, of Counsel.

[fol. 67] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated New York City, August 6th, 1930.

Roger Hinds, Solicitor for Plaintiff. Hamilton Ward, Attorney General, Solicitor for Defendants.

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] IN SUPREME COURT OF UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 28, 1930

Now comes the appellant, Educational Films Corporation of America, and in pursuance of Rule 13, subdivision 9, of the Rules of the United States Supreme Court, and states that it adopts its assignment of errors as its statement of the points to be relied upon, and represents that the whole of the record as certified to this Court is necessary for the consideration of this case.

Roger Hinds, Counsel for Appellant, 165 Broadway, Borough of Manhattan, New York City.

[fol. 70] Due and timely service of the within Statement of Points and Designation of Parts of the Record is hereby acknowledged.

Dated August 26, 1930.

Hamilton Ward, Attorney General of the State of New York, of Counsel for Respondent.

[fol. 71] [File endorsement omitted.]

Endorsed on cover: File No. 35,272. S. New York D. C. U. S. Term No. 350. Educational Films Corporation of America, Appellant, vs. Hamilton Ward, Attorney General of the State of New York, and Thomas M. Lynch et al., etc. Filed August 14, 1930. File No. 35,272.

FILE COPY

OCT 18 1930

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1930.

No. 350.

EDUCATIONAL FILMS CORPORATION OF AMERICA,
Appellant,

vs.

HAMILTON WARD, Attorney General of the State of New York, and THOMAS M. LYNCH, JOHN J. MERRILL and MARK GRAVES, comprising the NEW YORK STATE TAX COMMISSION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT MOTION TO ADVANCE.

ROGER HEAPS,
BENJAMIN P. DEWITT,
Counsel for Appellant.

HAMILTON WARD,
Attorney General of the State of New York of Counsel for Appellees.

PRINTED IN THE UNITED STATES BY BENJ. H. TYRREL, INC., 110 GREENWICH ST., NEW YORK.

Supreme Court of the United States,

OCTOBER TERM—1930.

No. 350.

EDUCATIONAL FILMS CORPORATION OF AMERICA,
Appellant,
vs.

HAMILTON WARD, Attorney General of the State of New York, and THOMAS M. LYNCH, JOHN J. MERRILL and MARK GRAVES, comprising the NEW YORK STATE TAX COMMISSION,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT MOTION TO ADVANCE.

Come now the Appellant and the Appellees in the above entitled cause and jointly move that this case be advanced for early hearing, and in support of their joint motion make the following brief statement of the matter involved, and the reasons relied upon for the advancement:

The question presented by this appeal is whether Article 9A of the New York Tax Law violates the Constitution of the United States, and particularly Article 1, Section 8 thereof, in so far as it includes in the measure of a corporate franchise tax the corporation's income

from United States copyrights, which appellant contends is in substance and effect a tax by one of the several states upon a federal instrumentality.

There are pending before the New York State Tax Commission numerous applications for revision of assessments involving this precise question, and involving large sums in taxes previously paid.

The collection of numerous other substantial assessments for the current year, also involving this precise question, has been suspended by the State of New York, while awaiting the determiination of this case.

It is believed that the decision in this case (involving copyright income) will also affect the taxation of corporations whose income includes royalties from patents.

An early decision of this case will be to the interest, not only of the State of New York, but of all other states whose corporate franchise taxes are measured by corporate income, among them being Massachusetts, California, Oregon, Washington, Tennessee and Missouri.

Wherefore both appellant and appellees pray that the case be advanced upon the calendar and assigned for hearing at any early date.

Respectfully submitted,

Roger Hinds,
Benjamin P. Dewitt,
of Counsel for Appellant.

Hamilton Ward,
Attorney General, of the State of New York, of Counsel for Appellees.

FILE COPY

OCT 13 1930
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1930.

No. 350.

EDUCATIONAL FILMS CORPORATION OF AMERICA,
Appellant,

vs.

HAMILTON WARD, Attorney General of the State of New York, and THOMAS M. LYNCH, JOHN J. MERRILL and MARK GRAVES, comprising the NEW YORK STATE TAX COMMISSION,
Appellees.

STATEMENT AS TO JURISDICTION ON APPEAL.

ROGER HINDS,
Counsel for Appellant.

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IN THE

Supreme Court of the United States,

OCTOBER TERM—1930.

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EDUCATIONAL FILMS CORPORATION OF AMERICA,
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HAMILTON WARD, Attorney General of the State of New York, and THOMAS M. LYNCH, JOHN J. MERRILL and MARK GRAVES, comprising the NEW YORK STATE TAX COMMISSION,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Statement as to Jurisdiction on Appeal.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

(a) STATUTORY PROVISION SUSTAINING JURISDICTION.

The act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938, (United States Code, Title 28, Section

345), provides that Section 238 of the Judicial Code is amended to read in part as follows:

> "Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:
>
> * * * * *
>
> "(3) An Act restricting the issuance of interlocutory injunctions to suspend the enforcement of the statute of a State or of an order made by an administrative board or commission created by and acting under the statute of a State, approved March 4, 1913, which Act is hereby amended by adding at the end thereof, 'The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit.'"

This is an appeal from a final decree dismissing the complaint on the merits and denying a permanent injunction in a suit to suspend enforcement of the statute of a state and denying an interlocutory injunction in said suit.

(b) DATE OF DECREE AND DATE OF APPLICATION FOR APPEAL.

The decree sought to be reviewed was entered on June 10, 1930 (R., 40, 42)*.

The Application for Appeal was presented on July 18, 1930 (R., 42).

---

*All references to the record are to the pages of the typewritten record as prepared by the clerk of the District Court. The record has not yet been printed.

(c) THE NATURE OF THE CASE.

Appellant brought a bill for an injunction in the District Court of the United States for the Southern District of New York to restrain the defendants comprising the New York State Tax Commission and the Attorney General of the State of New York from proceeding further with the levy and collection of a franchise tax pursuant to Article 9A of the New York Tax Law based on the net income of the plaintiff-appellant corporation for the year ending June 30, 1929 in so far as said tax is measured by income on royalties received by plaintiff from copyrights owned by plaintiff and granted by the United States of America (i. e. to the extent of $7,316.51 of said tax) on the ground that the aforesaid statute and said tax and the collection and levy thereof are in contravention and violation of the Constitution of the United States, and particularly Section 8, Article 1 thereof, as imposing a state tax upon income from an instrumentality of the United States and upon means employed by Congress to carry into effect the powers conferred upon it by the Constitution (R., 4 to 13 and 43, 44).

As required by Section 266 of the Judicial Code, District Judge Bondy called to his assistance to hear and determine the application for an interlocutory injunction Circuit Judge Chase and District Judge Woolsey (R. 3). The application and defendants' motion to dismiss the bill of complaint (R., 28) were heard by the three judges on March 8, 1930. The statutory court thus created, upon an opinion by Circuit Judge Chase (R., 31), denied the application for interlocutory judgment and dismissed the bill of complaint, as amended, upon the merits (R., 40, 41).

The jurisdiction of the federal court was invoked on the ground of the alleged federal unconstitutionality of the said Article 9A of the New York Tax Law.

The matter in controversy exceeds, exclusive of interest and costs, the sum and value of $3,000.

Application for appeal from the decree was presented and allowed on July 18, 1930 (R., 42).

(d) Cases believed to sustain jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Cudahy Packing Company v. *Hinkle, et al.*, 278 U. S. 460;
St. Louis & S. W. R. R. Co. v. *Nettin*, 277 U. S. 15;
Clark v. *Poor*, 274 U. S. 554;
Smith v. *Wilson*, 273 U. S. 388, 391;
Moore v. *Fidelity & Deposit Co.*, 272 U. S. 317, 320;
Ex parte Buder, 271 U. S. 461, 464-465;
Pacific Telephone & Telegraph Co. v. *Kuykendall*, 265 U. S. 196, 206;
Shaffer v. *Carter*, 252 U. S. 37, 44.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Sections 238 and 266 of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

Roger Hinds,
Counsel for Appellant.

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NOV 24 1930
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM—1930.

No. 350.

EDUCATIONAL FILMS CORPORATION OF AMERICA,
Appellant,

against

HAMILTON WARD, Attorney General of the State of New York, and THOMAS M. LYNCH, JOHN J. MERRILL and MARK GRAVES, comprising the NEW YORK STATE TAX COMMISSION,
Appellees.

BRIEF FOR APPELLANT.

BENJAMIN P. DEWITT,
ROGER HINDS,
SIEGFRIED F. HARTMAN,
of Counsel for Appellant.

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SUBJECT INDEX.

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Supreme Court of the United States

OCTOBER TERM—1930.

No. 350.

EDUCATIONAL FILMS CORPORATION OF AMERICA,
Appellant,

against

HAMILTON WARD, Attorney General of the State of New York, and THOMAS M. LYNCH, JOHN J. MERRILL and MARK GRAVES, comprising the NEW YORK STATE TAX COMMISSION,
Appellees.

BRIEF FOR APPELLANT.

Reference to official report of opinion delivered in the Court below.

The opinion in this case in the court below, the United States District Court for the Southern District of New York, appears in the printed record (pp. 53 to 58 inclusive), and is reported in 41 Fed. (2d) 395.

Statement of grounds on which jurisdiction is invoked.

In the "Statement as to Jurisdiction on Appeal", filed on October 13, 1930, in this Court in compliance

with paragraph 1, Rule 12, the grounds on which jurisdiction is invoked are fully set forth, together with the date of the decree in the court below, the nature of the case and rulings made in the lower court, definite reference to statutory provisions under which jurisdiction is invoked, and cases cited in support of jurisdiction.

Statement of the case.

Plaintiff-appellant brought this suit in the United States District Court for the Southern District of New York to restrain the defendants, comprising the New York State Tax Commission, from proceeding with the collection of a tax, based on plaintiff's net income, to the extent ($7,316.51) that the basis of said tax includes royalties received by plaintiff from United States copyrights, on the constitutional ground that copyrights are federal instrumentalities not subject to state taxation.

Federal jurisdiction depends on the existence of the aforesaid federal question.

Equity jurisdiction—which has not been questioned by appellees or by the court below—is based (R., 7 to 10, 48, 49) on the fact that the New York Tax Law does not furnish an adequate remedy at law to the taxpayer to recover back the tax, if paid (see VIII *infra*).

This appeal is from the final decree of the District Court granting defendants' motion to dismiss the bill of complaint, dismissing said bill on the merits, and denying plaintiff's application for interlocutory injunction (R., 58, 59).

The appellant (plaintiff in the court below) is a business corporation organized under the laws of the State of New York (R., 4). It is engaged in business as proprietor, distributor and licensor of copyrighted motion picture productions (R., 5, 44). During the fiscal year in question appellant was the owner and proprietor of

certain copyrights of the United States of America upon motion picture films or productions, which are listed by name, date and number in Schedule "A" (R., 11-40). Some of the copyrights are issued in appellant's name, some in the names of affiliated corporations (see Schedule "A"), but all were and are owned by appellant (R., 5, 44).

During said fiscal year ending June 30, 1929, appellant received income to the extent of $162,588.98 consisting of royalties on said copyrights received from various exhibitors of motion pictures under license contracts under which appellant granted to said exhibitors for specified periods and in specified theatres and localities "a license under copyright" to project and exhibit appellant's copyrighted motion pictures under said copyrights, in consideration of the payment to appellant of specified royalties or license fees (R., 5, 6, 45, 46).

All of said copyright income was received by appellant from exhibitors under uniform printed contracts, of which a form is annexed to the moving affidavit of appellant's treasurer (Exh. "C", opp. R., 46).

Said contract provides, in part as follows:

> "SECOND: (a) The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the schedule herein * * * to exhibit * * * each of such photoplays at the said theatre only for the number of successive days in the said Schedule provided * * *.
>
> * * * * * *
>
> "FOURTH: The Exhibitor agrees to pay for such license as to each of such photoplays the fixed sums herein specified * * *.
>
> * * * * * *
>
> "TWENTY-SECOND: This instrument shall be deemed an application for a license under copyright only and shall not become binding until ac-

> cepted in writing without alteration or change by an officer of or any person duly authorized by the distributor * * *."

On October 11, 1929, as required by Section 211 of the Tax Law, appellant duly executed, verified and filed with the State Tax Commission its franchise tax return for its fiscal year ending June 30, 1929, using a printed blank provided for that purpose by the Commission. A copy of the return and annexed schedules is annexed to the bill of complaint (Exh. "B", opp. R., 40).

As required by Section 211 of the Tax Law, and by the official blank, appellant set forth (Exh. "B", item 8) its "entire net income for the fiscal year commencing July 1, 1928 and ending June 30, 1929, as shown by its report to the United States Treasury Department—$231,372.94" (R., 5).

As required by Section 211 (2) of the Tax Law, and by the official blank, appellant reported in Item 14 the following:

> "If the amount reported in (8) is *inaccurate,** *inapplicable*, state the amount claimed to be correct —*$68,783.96* (*See Attached Explanation*)."

Appellant attached to its return (R., 42) a statement entitled "Explanation of Item 14" above referred to in which it set forth that its "corrected net income" after deducting the sum of $162,588.98 consisting of copyright royalties, was $68,783.96, and that "said royalty income was not and is not subject to tax and may not be used as a measure of any tax purporting to be a corporate franchise tax based on or measured by income, under the Constitution of the United States and decisions of the United States Supreme Court."

---

*Note: The word "inaccurate" as thus used in the statute (§ 211, subd. 2) has been construed to mean "not properly to be considered * * * as a basis for state taxation". *Peo. ex rel, Alpha etc. Co.* v. *Knapp*, 230 N. Y. 48, 68, 69.

Thereafter on January 29, 1930, the State Tax Commission overruled appellant's claim that its copyright income should be excluded in computing the said tax and served official notice that it had assessed plaintiff's tax in the sum of $10,411.79 based on its entire net income ($231,372.94) at 4½% (R., 6, 7, 45), which is $7,316.51 more than said tax would have amounted to if said copyright royalties had not been included in appellant's income in computing said tax (R., 6, 46).

The aforesaid ruling of the State Tax Commission was made pursuant to its announced and fixed purpose not to allow, but on the contrary to reject and disallow, any and all claims by corporate taxpayers that income from copyrights, patents, federal bonds and other federal instrumentalities may not (under the federal constitution) be included in the measure of the franchise tax. The Commission further has indicated that it will continue to adhere to said purpose and practice of including, and refusing to exclude, such income in computing such taxes unless and until it be determined by the courts that the constitutional rights of taxpayers are thereby violated (R., 9, 48, 49).

In its bill of complaint (R., 7) to restrain the collection of said tax to the extent of $7,316.51 as aforesaid, appellant asserted that further application to the State Tax Commission for the revision of the assessment would be useless under the circumstances (R., 7 to 10). The Commission, after the commencement of the suit, granted appellant a hearing, and a hearing was accordingly had, and the assessment was affirmed (R., 50, 51).

By stipulation and by the order of the court below the facts as to the aforesaid hearing and confirmation of the assessment were brought in by an amendment of the bill of complaint, and by the same stipulation and order the appellees were deemed to have moved formally to dismiss the bill (R., 50, 51, 52).

After a hearing before three judges pursuant to Section 266 of the Judicial Code, a final decree was entered dismissing the appeal as amended upon the merits and denying plaintiff's application for an interlocutory injunction (R., 58, 59).

Appellant, prior to the commencement of the suit, paid the portion of the tax admittedly due ($3,095.28), and appellees have voluntarily suspended further proceedings to collect the disputed portion ($7,316.51) pending the determination of the appeal to this Court.

The statute whose constitutionality is attacked is Article 9-A of the New York Tax Law, and particularly Sections 208, subdivision 3, 209 and 215, in that, and in so far as, it subjects appellant to a tax based on its income from copyrights of the United States.

Section 209, so far as material here, provides as follows:

> "209. *Franchise Tax on corporations based on net income.*—For the privilege of exercising its franchise in this State in a corporate or organized capacity every domestic corporation, * * * shall annually pay in advance for the year beginning November first next succeeding the first day of July in each and every year an annual franchise tax, to be computed by the tax commission upon the basis of its entire net income, as defined in subdivision three of section two hundred and eight of the tax law, for its fiscal or the calendar year next preceding, as hereinafter provided, which entire net income is presumably the same as the entire net income which such corporation is required to report to the United States, plus any income received as dividends on stocks or any interest received on bonds of any character * * *".

Section 208, subdivision 3 (referred to in Section 209, *supra*), so far as material here, provides as follows:

> "3. The term 'entire net income' means the total net income, including all dividends received on stocks and all interest received from federal, state, municipal or other bonds * * *."

Section 211, so far as material here, provides as follows:

> "211. *Reports of corporations to tax commission.*—Every corporation taxable under this article * * * shall annually on or before July first, or within thirty days after the making of its report of entire net income to the United States treasury department for any fiscal or calendar year, preceding said first day of July, transmit to the tax commission a report in the form prescribed by the tax commission, specifying:
> * * * * * * *
>
> "2. The amount of its entire net income for its preceding fiscal or the preceding calendar year as provided by subdivision three of section two hundred and eight of the tax law * * *. If the corporation shall claim that the return made to the United States treasury department was inaccurate, the amount claimed by it to be the net income for such period shall be specified * * *."

Section 215 provides, so far as material here:

> "215. *Rate of tax.*—The tax imposed by this article shall be at the rate of four and one-half per centum of the entire net income of the corporation * * * determined as provided by this article * * *".

The following excerpts from Sections 214 and 214(a) are quoted merely because of the phrases *characterizing the tax*, which phrases we have italicized:

> "214. *Computation of tax*—If the entire business of the corporation be transacted within the state, the tax imposed by this article, if *imposed UPON the entire net income*, shall be based upon the entire net income of such corporation for such fiscal or calendar year * * *."
> * * * * * * *
>
> "8. If any corporation has been permitted to change the period for which it shall make its report, it shall be *taxed UPON the entire net income*

which has not been used or included in measuring a franchise tax to this state as though the entire net income had been earned within one year."

* * * * * *

"10. It is further provided that * * * any corporation newly organized * * * which is not subject to a *franchise tax ON net income as provided in section two hundred and nine of this article,* shall be subject to the minimum tax * * *."

"If such corporation is subject to a tax under the provisions of this article of the tax law, and it maintains no regular place of business outside of this state, except a statutory office, it shall be *taxed UPON its entire net income,* or entire issued capital stock, or otherwise, as hereinbefore provided."

"214-a. *Taxation of corporations acquiring assets or franchises of other corporations.* If any business corporation shall acquire * * * the franchises of another corporation * * * it shall be liable for and pay all taxes that would have been due * * * and shall be *taxed UPON such combined net income* * * *. The provisions for the minimum tax shall be applied only when under such provisions a tax will result in excess of the amount which would be produced by a *tax ON entire net income* as hereinbefore provided and then in lieu thereof."

The pertinent provisions of the United States Copyright Law (U. S. Code, Title 17; Mar. 4, 1909, c. 320, §§1 and 5; 35 Stat. 1075, 1076; Aug. 24, 1912, c. 356; 37 Stat. 488) are as follows:

"Sec. 1. Any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

* * * * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever

thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;

* * * * * *

"Sec. 5. The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

* * * * * *

(l) *Motion-picture photoplays;*
(m) *Motion pictures other than photoplays.*"

The appellant assigns to be here urged the following errors in the record and proceedings in the said case (R., 60, 61).

"1. That the United States District Court erred in denying plaintiff's application for an interlocutory injunction herein.

"2. That the said United States District Court erred in granting the motion of the defendants to dismiss the bill of complaint herein as amended, and in dismissing the same.

"3. That the said United States District Court erred in entering a decree denying plaintiff's application for an interlocutory judgment herein and dismissing the bill of complaint herein as amended.

"4. That the said United States District Court erred in holding and deciding that Article 9A of the New York Tax Law, in so far as it attempts to include in the measure of the tax provided therein, income received by plaintiff from copyrights of the United States is not in contravention and violation of the Constitution of the United States and particularly Section 8 of Article 1 thereof, as imposing a state tax upon income from an instrumentality of the United States and upon means employed by Congress to carry into effect the powers conferred upon it by the Constitution.

"5. That the said United States District Court erred in holding and deciding that the collection of the tax of $7,316.51 imposed pursuant to Article 9A of the New York Tax Law threatened by the defendants comprising the New York State Tax Commission and measured by plaintiff's income in so far as the same includes income from copyrights of the United States should not be enjoined during the pendency of this suit, and permanently, as in violation of plaintiff's rights under the Constitution of the United States and particularly Section 8 of Article 1 thereof."

Summary of argument.

1. That part of appellant's income which consists of royalties from copyrights of the United States, is exempt from state taxation.

2. The tax involved herein, particularly when considered from the standpoint of immunity from state taxation of income from federal instrumentalities, is in substance and practical operation a tax on income.

3. Under the authority of the *Macallen* case (279 U. S. 620) Article 9-A of the New York tax law is unconstitutional in so far as the tax thereunder is based on income from federal instrumentalities.

4. The decisions in *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, and earlier cases are inapplicable to the New York statute here involved.

5. The fact that the basis of the tax is net income rather than gross income does not justify its inclusion of federal income. Decisions based on that distinction are expressly limited to taxes measured by income from interstate commerce, whose immunity from state taxation has been declared by this Court to be one of degree

only, while immunity of income from federal instrumentalities is absolute, extending to taxes in which net income is either the subject or the basis of the tax.

6. Income from royalties on copyrights *owned* by appellant, including income from those registered in the names of others, as well as income from those registered in appellant's own name, is entitled to exemption from the state tax.

7. All plaintiff's expenses, including those incurred in procuring the exempt income, as well as those incurred in procuring taxable income, are deductible from gross income in calculating that portion of plaintiff's net income which is subject to the tax.

8. Injunctive relief is appropriate because the remedy at law furnished by the New York Tax Law for the recovery back of the tax if paid is inadequate for four reasons: (a) because no interest is allowed; (b) because the statutory right to refund is not certain; (c) because the judicial remedy (certiorari) is not available in the federal courts; and (d) because the prerequisite administrative procedure, as actually applied, is dilatory and uncertain. Neither the appellees nor the court below have questioned the assertion that the legal remedy is inadequate, and that this suit is an appropriate one for the determination of the fundamental constitutional question herein presented.

ARGUMENT.

I.

Since the income upon which the disputed tax is based consists of royalties from United States copyrights owned by appellant, it is immune from taxation by the State of New York.

There were included in appellant's income upon which the disputed tax was based royalties from United States copyrights to the amount of $162,588.98 (R., 5).

Those royalties were all received by appellant from exhibitors of motion pictures under uniform printed contracts by virtue of the following provisions (R., 5, Exh. "C", opp. R., 46):

> "SECOND: (a) The Distributor hereby grants to the Exhibitor, and the latter accepts, a license under the respective copyrights of the several photoplays designated and described in the schedule herein * * * to exhibit * * * each of such photoplays at the said theatre only for the number of successive days in the said Schedule provided * * *.
>
> * * * * * * *
>
> "FOURTH: The Exhibitor agrees to pay for such license as to each of such photoplays the fixed sums herein specified * * *.
>
> * * * * * * *
>
> "TWENTY-SECOND: This instrument shall be deemed an application for a license under copyright only * * *".

Instrumentalities of the federal government may not be taxed by the states.

McCulloch v. *Maryland*, 4 Wheat, 316, 432.

Patents, being federal instrumentalities, may not be taxed by the states.

> *Peo. ex rel. Edison, etc. Co.* v. *Assessors,* 156 N. Y. 417.
>
> *People ex rel. N. Y. etc. Tel. Co.* v. *Neff,* 15 N. Y. App. Div. 8, 13; aff'd. 156 N. Y. 701;

Similarly, copyrights may not be taxed by the states.

> *People ex rel. U. S. Aluminum Co.* v. *Knight,* 174 N. Y. 475.

In the above cited case the New York Court of Appeals said (p. 483):

> "There is no distinction, so far as the right of taxation is concerned, between copyrights and patent rights, and the state has no power to tax either."

In the recent case of *Long* v. *Rockwood,* 277 U. S. 142, affirming 257 Mass. 572, this Court held that the *income* from patents may not be taxed by the states, saying:

> "The power to exclude others (by patent or copyright is) granted by the United States * * * *such instrumentalities* may not be taxed by the States." (Italics ours.)

Chief Justice Marshall in *M'Culloch* v. *Maryland,* (*supra*) said (p. 432):

> "If the States may tax one instrument, employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax *patent rights;* they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This

> was not intended by the American people. They did not design to make their government dependent on the States." (Italics ours.)

The foregoing was merely an elaboration of the much-quoted phrase *M'Culloch* v. *Maryland* (*supra*) (p. 431):

> "The power to tax involves the power to destroy."

> "Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State."
>
> *California* v. *Pacific R. R. Co.*, 127 U. S. 1, 41.

The New York State Tax Commission has recognized the obvious application of the principle of *Long* v. *Lockwood* to the income of *individuals* from copyrights, in the following ruling:

> "Following the decision of the Supreme Court of the United States in the case of *Long* v. *Rockwood*, 277 U. S. 142, it will be held that royalty income from patents *and copyrights* granted by the United States Government is not subject to tax under Article 16 of the New York State Tax Law * * *." (From Ruling of State Tax Com., March 27, 1929, Prentice-Hall, N. Y. Tax Service, ¶10,843.) (Italics ours.)

All other states having income tax laws, so far as we have been able to ascertain, have similarly recognized, and now apply, the principle that *income from copyrights may not be taxed by a state.*

II.

The tax involved herein, particularly when considered from the standpoint of the immunity from state taxation of income from federal instrumentalities, is in substance and effect and in practical operation a tax on income.

The taxing statute (Sec. 209) commences:

> "*Franchise tax on corporations based on net income.* For the privilege of exercising its franchise * * * every domestic corporation * * * shall annually pay * * * an annual franchise tax * * * *upon the basis* of its entire net income * * *" (italics ours).

After the introductory employment of the phrase "*for* the privilege * * *" in Section 209, that phrase is not again employed throughout the entire rather lengthy statute (Article 9-a). Whenever the *nature* of the tax is referred to, the expression "tax upon the *basis* of net income" or the expression "tax *based* on entire net income" or the expression "tax *on* net income" is employed.

In fact, more than once in the course of the extended verbiage of this statute, such significant phrases as the following are employed:

> "the tax * * * imposed *upon* the entire net income" (§214).
>
> "* * * taxed *upon* the entire net income" (§214, subd. 8).
>
> "* * * franchise tax *on net income* as provided in Section two hundred and nine of this article * * * " (§214, subd. 10).
>
> "* * * shall be *taxed upon* such combined entire net income * * *" (§214-a).

> "* * * tax *on* entire net income as hereinbefore provided" (§214-a).

The New York Court of Appeals, in an opinion by Judge Cardozo, in *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, (1920) said of this very tax (pp. 57, 62):

> "* * * the tax imposed upon this franchise must be held in practical operation to be a *tax upon the income*. Such, indeed, it would be in form as well as in substance, if the legislature had not stated (sec. 209) that the 'privilege of doing business' was the consideration for the payment. Nothing but that recital stands between the statute and conceded invalidity. How the legislature itself looked upon the substance of the burden is indicated by other provisions of the same and later statutes. The tax is to be in lieu of all other taxes on personal property or capital stock (Tax Law, sec. 219-J). It is to be in lieu of all other taxes upon income (sec. 350, subd. 7). There surely was no intention that all mercantile and manufacturing corporations, foreign and domestic, should in very truth be exempt from taxes upon property so fundamental in importance as capital and the fruits of capital. The reason for the apparent exemption was that, under the form of a tax upon the franchise, the property of such corporations had already been subjected to its share of public burdens. I think, therefore, that in substance, though not in form, in tendency, though not in name, this tax is equivalent to a tax upon relator's income. * * * In form, the tax is one upon the value of a privilege, and income is nothing but the measure. *In substance*, as we have seen, it is the same as if *imposed directly upon* income." (Italics ours).

In *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, at page 629, this Court said:

> "* * * the state cannot tax the instrumentalities or bonds of the United States, or, what is the

> same thing, the income derived therefrom, *directly or indirectly* * * *". (Italics ours).

This Court said in *Weston* v. *Charleston*, 2 Pet. 449, 468, quoted in *Farmers, etc. Bank* v. *Minnesota*, 232 U. S. 516, and in the *Macallen* case:

> "The right to tax the contract (a federal instrumentality) *to any extent*, when made, must operate upon the power to borrow before it is exercised, and have a *sensible influence* on the contract. The extent of this influence depends on the will of a distinct government. *To any extent, however inconsiderable*, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely." (Italics ours).

And, as we shall discuss in a later point (III, infra) this Court, in the *Macallen* case, referring to the Massachusetts corporation excise tax, which may more properly be characterized "excise tax" than may the New York tax here involved, said (pp. 626, 634):

> "And this court must determine for itself by independent inquiry whether the tax here is * * * an excise tax on the privilege of doing business, or, under the guise of that designation, is in substance and reality a tax on the income derived from tax-exempt securities."

(p. 634):

> "* * * the amended act *in substance and effect* imposes a tax upon federal bonds and securities."

In the brief filed in behalf of the New York State Tax Commission, as *amicus curiae*, in the *Macallen* case, the State of New York said, by its counsel (p. 2):

> "The taxing systems of the State of New York and the Commonwealth of Massachusetts are so

> nearly identical in the particulars wherein they are affected by this suit that whatever decision is reached by this court will doubtless apply with like force to the State of New York.
>
> " * * * (p. 4) the New York law parallels the Massachusetts law in that the primary basis for the imposition of the tax is the entire net income as returned to the United States. * * * (p. 4) The tax is *UPON net income* * * * (p. 5) the New York legislature was actuated by the same motives as was the legislature of Massachusetts when it enacted St. 1925, c. 343, amending G. L. c. 63." (Italics ours.)

In *People ex rel Bass, Ratcliff, etc.* v. *Tax Commission*, 232 N. Y. 42, aff'd 266 U. S. 271, the New York Court of Appeals said, p. 46:

> "The tax is denominated a franchise tax and although we have said *in another connection* (*People ex rel. Alpha P. C. Co.* v. *Knapp, supra*, p. 57) that 'the tax imposed upon this franchise must be held in practical operation to be a tax upon the income * * * . This tax is equivalent to a tax upon relator's income', it is primarily a tax levied for the privilege of doing business in the state." (Italics ours).

And this Court (266 U. S. at p. 280) said:

> "We see no reason to doubt the accuracy of the statement made by the Court of Appeals in the present case that the franchise tax imposed by the statute is 'primarily a tax levied *for* the privilege of doing business in the State.' It is not a *direct* tax upon the allocated income of the corporation * * *." (Italics ours).

But it will be noted that neither this Court nor the New York Court of Appeals declared the tax to be, even "primarily", a tax *on* the privilege, or in the slightest degree dissented from Judge Cardozo's description of it (230 N. Y. pp. 57, 62, *supra*) as "in practical operation * * * a tax upon the income."

In the *Bass, Ratcliff* case the Court was not considering income which was exempt, *per se*, from state taxation. It was considering income from interstate commerce, whose immunity from state taxation is not absolute, but merely one of degree (See *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505, discussed in III, *infra*).

In 1925, several years after the decision in the *Bass, Ratcliff* case, a New York court in *De La Vergne Co.* v. *Tax Commission*, 211 App. Div. 227, affirmed by the Court of Appeals (241 N. Y. 517) said, concerning this tax (p. 231):

> "* * * It was the net income received by the corporation during that year which was made the basis of the tax. Therefore, if we regard the tax as being essentially a tax upon net income it was a tax upon income accruing to the United States and consequently invalid as a tax upon Federal property. The same result follows if we regard it as a tax upon the privilege of doing business or exercising a franchise."

As we have seen above, the New York statute itself, in describing the tax, repeatedly refers to it not merely as a "tax *based on* net income" but actually as a "tax *upon* entire net income", the latter expression being employed in several different places in the statute.

Even the introductory phrase, which is employed just once (§209), recites that the tax shall be paid "*for* the privilege * * *", rather than that the tax is "*on* the privilege". So much for the statute itself.

As for the judicial characterization of the tax, we have seen that Judge Cardozo's description of it as in substance and practical operation a "tax on income" has never been disapproved, and that the farthest that either the Court of Appeals or this Court has gone in the direction of calling the levy a privilege tax is to say that it is not a *direct* tax on income, and that primarily the tax is paid "*for* the privilege".

Even the Attorney-General of New York has, as we have seen (p. 18, *supra*), referred to the tax as a tax *upon* net income.

From all of the foregoing we distill the following summary of the nature of the tax in question, viz.: that, whether or not the tax is a *direct* tax on income, and primarily a tax paid *for* the privilege of exercising the corporate franchise, it is nevertheless in substance and effect and practical operation a tax *on income.*

The decisions of this Court with respect to the Wisconsin and Massachusetts corporation excise taxes show that there is no inconsistency in holding (as the New York courts have done) that a given tax may be *for a privilege* and still, in *substance and effect,* be a *tax on income.*

In *Northwestern Ins. Co.* v. *Wisconsin,* 247 U. S. 132 (1917) this Court said (p. 137):

> "The tax in question is * * * one for the privilege of doing * * * business."

Yet in *Northwestern Ins. Co.* v. *Wisconsin,* 275 U. S. 136 (1927) this Court said (p. 139):

> "* * * this Court has interpreted the statute and pointed out its real nature. *Northwestern Mutual Life Ins. Co.* v. *State of Wisconsin,* 247 U. S. 132, 137. Speaking there of this same statute we did declare: 'The tax in question is, therefore, not only one for the privilege of doing life insurance business within the State, but is in effect a commutation tax levied by the State in place of all other taxation upon the personal property of the company in the State of Wisconsin'. But no question was then raised concerning taxation of income derived from United States bonds. The point now presented was not involved. * * * This amounts, we think, to an imposition on the bonds themselves."

Likewise, with respect to the Massachusetts tax, the statute itself proclaims the tax to be an "excise" (G. L., c. 63, Sec. 32), and both the Massachusetts Courts and this Court have described it as

> "• • • not taxes *on* property or net income, but taxes *measured by* property and net income."
>
> *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 216
>
> *Baltic Mining Co.* v. *Massachusetts*, 231 U. S. 68, 84, and 207 Mass. 381
>
> *S. S. White Dental Co.* v. *Commonwealth*, 212 Mass. 35.

And even the amendment which this Court in the *Macallen* case declared unconstitutional was described by the highest State Court as follows:

> "It is an excise with respect to the carrying on or doing of business by the corporation, measured by property and net income. It is not a tax on property and net income" (264 Mass. 396, 400).

Yet this Court, in the *Macallen* case (*supra*) said (p. 634):

> "• • • *in substance and effect* (it) imposes a tax upon federal bonds and securities." (Italics ours.)

Similarly, the Supreme Court of Washington, in the recent case of *Aberdeen Savings and Loan Ass'n* v. *Tax Commission*, 57 Wash. 255; 289 Pac. 536 (discussed in III, *infra*), decided June 12, 1930, declared a tax "for the privilege of exercising corporate franchise" to be an attempt to levy a *tax on income from federal securities.*

And the Tennessee Supreme Court in June 1930 in the case of *Quicksafe Mfg. Corp.* v. *Graham*, (Tenn.) 29 S. W. (2d) 253 (discussed in III, *infra*) held that a

similar corporation excise tax, in so far as based on *income from patents,* was such as to

> "* * * *amount* to a tax upon the patent right itself" (quoting *Long* v. *Rockwood,* 277 U. S. 145).

III.

Under the authority of the Macallen case, Article 9-A of the New York tax law is unconstitutional in so far as the tax thereunder is based on income from federal instrumentalities.

In three cases—the only cases, so far as we have been able to find, in which the *Macallen* decision has been interpreted—it has been interpreted as holding that a state tax, though in form an excise tax, is unconstitutional in so far as it taxes, directly or indirectly, income from federal instrumentalities.

The Supreme Court of the State of Washington, following the *Macallen* case, has held that the excise tax law of that State (C. 151, Laws of 1929) is unconstitutional in so far as it includes in the measure of the tax income from tax exempt securities. Answering the contention that the tax is an excise tax and not a tax on income, the Court said:

> "Respondents contend that the tax provided for by the statute is technically an excise for the privilege of doing business as a corporation, or what is generally known as a corporate franchise tax. For the purposes of this opinion, we assume that a tax by way of an excise to be collected by the state for the exercise of corporate privileges would be valid. The act itself in section 3 and 4 contains a recital that the tax is to be paid by each corporation liable thereto 'for the privilege of exercising its corporate franchise within this

state.' Such a legislative declaration is to be carefully considered by the courts and due weight given thereto. Courts should, however, in construing an act containing such a declaration, consider the true operation and effect of the law which must be dealt with on the basis of the practical results which follow its operation, and not alone by legislative declarations contained therein.

In this connection the following opinions of the Supreme Court of the United States are pertinent: Craig *v.* Missouri, 4 Pet. 410, 7 L. Ed. 903; Mugler *v.* Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205; Louisville Gas & Electric Co. *v.* Coleman, 277 U. S. 32, 48 S. Ct. 423, 72 L. Ed. 770; St. Louis Cotton Compress Co. *v.* Arkansas, 260 U. S. 346, 43 S. Ct. 125, 67 L. Ed. 297; Postal Tel.-Cable Co. *v.* Taylor, 192 U. S. 64, 24 S. Ct. 208, 48 L. Ed. 342; Macallen Co. *v.* Massachusetts, 279 U. S. 620, 49 S. Ct. 432, 73 L. Ed. 874."

"Appellants rely on the opinion of the Supreme Court of the United States in the case of Macallen Co. *v.* Massachusetts, 279 U. S. 620, 49 S. Ct. 432, 73 L. Ed. 874, in which an opinion of the Supreme Judicial Court of Massachusetts, holding constitutional a law of that state providing for the payment by Massachusetts business corporations of an annual payment by way of an excise, was reversed and the law held unconstitutional. The statute of Massachusetts which was attacked required, among other things, the payment of 'an amount equal to two and one-half per cent. of that part of its net income, as defined in this chapter, which is derived from business carried on within the commonwealth'. St. Mass. 1923, c. 424, Sec. 1. The law had at one time exempted from the net income upon which the tax should be computed interest upon bonds, notes, and certificates of indebtedness of the United States, but by amendment this exemption was deleted, and no deduction of such interest in computing the net income was provided for."

"The court assumes, as a controlling principle, that the state cannot tax the instrumentalities or

bonds of the United States, while on the other hand the state is at liberty to tax corporations with respect to the doing of business."

Aberdeen Savings & Loan Assn. v. *Chase*, 57 Wash. 255 at pp. 265, 267 and 268, 289 Pac. 536 at pp. 542 and 543.

Similarly, the Supreme Court of Tennessee, since the *Macallen* decision, has held that the corporate excise tax of that state (c. 21, Acts of 1923) may not be imposed upon *royalties from patents:*

"The defendants appealed, insisting that complainant is subject to the excise tax imposed by chapter 21, Acts 1923. The tax levied by this act is a privilege tax upon domestic and foreign corporations organized for profit and carrying on business in this state. The annual tax is measured by a sum equal to 3 per cent. of the net earnings for each preceding fiscal year, arising from business done wholly within the state. * * *

"The complainant derived no profit from the manufacture and sale of the patented article which was manufactured by the licensee. Its income was derived altogether from the royalties on its patent right. The state could not levy a tax upon the value of the patent right, and where the state attempts to tax income inquiry is allowed to the sources from which the income is derived, and the same considerations that would invalidate a tax upon the source would also invalidate a tax upon the income."

Quicksafe Mfg. Corp. v. *Graham*, (Tenn.) 29 S. W. (2d) 253.

In the matter of the appeal of *Vortox Mfg. Co.*, before the State Board of Equalization of the State of California, the Board was asked to find that the corporate franchise tax act of California (Chap. 13, Stat. 1929)

was unconstitutional in so far as it included in the tax base income from patent royalties. The Board said:

> "The appeal is based upon the proposition that inclusion of patent royalties in the tax base is, in effect, taxation of income from a federal instrumentality.
>
> "In support of this view the appellant cites two recent decisions of the United States Supreme Court. One of these, Long *v.* Rockwood, 277 U. S. 142, holds that a state may not tax directly royalties from patents. The other, Macallen *v.* Massachusetts, 279 U. S. 620, holds that, under the guise of an excise tax measured by net income, a state may not tax income from exempt sources, such as federal and state bonds, thereby accomplishing by indirection what it is forbidden to do directly."
>
> Re *Vortox Mfg. Co.;* Prentice-Hall State Corporation Tax Service, Vol. 1, sec. 11,045, p. 11,123; U. S. Daily, August 13, 1930, p. 1853.

The Board indicated clearly that it considered the act unconstitutional, but, as a non-judicial body, declined to make a decision to that effect, saying:

> "The power to declare a law unconstitutional is one of the highest attributes of judicial authority. Although we sit in these matters as a quasi-judicial body, and must decide questions of law as well as of fact, we should not lose sight of the ultimate fact that we are not a Court but merely an administrative Board. The right of a ministerial officer to question the constitutionality of a statute is generally denied."

The appellees will doubtless contend in this Court, as they did in the Court below (1) that the decision of this Court in the *Macallen* case rested solely upon evidence of intent of the Massachusetts legislature to reach exempt income; (2) that no such intent was manifested by the New York legislature; and (3) that therefore the

decision in the *Macallen* case does not apply to the New York tax statute herein questioned.

The contention that the decision of this Court in the *Macallen* case is limited to cases where legislative intent to tax exempt income can be shown is inconsistent with what was said by the State of New York in its brief filed, as *amicus curiae*, on the petition for re-hearing in the *Macallen* case, through its Attorney General:

> "It may be that the Court intended to limit its decision to those cases where the State legislature has deliberately set out to reach non-taxable income under the guise of an excise tax. We doubt that this can be a correct interpretation of the opinion, however, for under it, as so interpreted, there would exist a situation where certain states would be lawfully including income from tax-exempt securities in the measure of the tax while those states which had offended by specifically including such income would never thereafter be able to include it."

The same argument, that legislative intent was the controlling circumstance in the *Macallen* case, was made to the Supreme Court of the State of Washington in the *Aberdeen* case (*supra*). That Court rejected the argument in the following language (p. 269):

> "On behalf of respondents it is argued that the ruling of the *Macallen* Case was based wholly on the fact that the court felt constrained to hold that the real object and purpose of the Massachusetts act was to impose a tax upon governmental tax-exempt securities. It is true, as above stated, that the act as originally passed provided that interest upon such securities should be deducted in determining the net income upon which the tax should be computed, and that a special tax commission appointed to consider the tax situation in Massachusetts made a report in which it recommended that the law be amended by disallowing

this exemption, and that the Legislature thereupon passed an amendatory act following the suggestion of the commission, thereby distinctly indicating a change of policy on the part of the state. In its opinion the Supreme Court of the United States refers to this action on the part of the Legislature, as indicating an express purpose to subject governmental tax-exempt securities to the burden of the tax, and states 'that the amended act in substance and effect imposed a tax upon federal bonds and securities'. It is, of course, true that these remarks of the Supreme Court were clearly warranted by the facts before it, but we are unable to see that this makes any difference in the principle involved. The act of the Legislature of this state now under consideration was enacted after the passage of the amended act by the Massachusetts Legislature, and after that act had been held constitutional by the Supreme Judicial Court of that state. No act of any similar nature existed in this state prior to the passage of the statute of 1929, and we cannot imagine that it could be held that the amended act of Massachusetts was unconstitutional, in so far as it affected federal tax-exempt securities, and that the act of this state could be held good in that particular, simply because prior to the enactment of the 1929 statute no law of similar purport had existed in this jurisdiction. It is true that the primary purpose of the Legislature of Massachusetts in passing the amendatory act may have been to procure for the state as part of its revenue a proportion of the interest paid to Massachusetts corporations by the United States on governmental securities, while nothing in the record now before us indicates that such was the *primary* purpose of the Legislature of this state in enacting the 1929 law. But this again makes no difference in the principle involved, which is identical in both instances. It is, of course, true, as argued on behalf of respondents, that the Supreme Court of the United States did not hold that a state cannot tax the corporate privilege and measure the tax

by net income; the court expressly saying that 'the state is at liberty to tax a corporation with respect to the doing of its business'. The court continues, however, by saying that 'the state cannot tax the income of the corporation derived from nontaxable securities'.

"The Legislature, in enacting such a statute as that now before us, must be held to have primarily intended all the major consequences of the act, and we are clearly of the opinion that, under the ruling of the Supreme Court in the case of Macallen Co. *v.* Massachusetts, supra, the law of 1929, unlawfully attempts to levy a tax upon governmental securities, which under the law of the United States the state has no right or power to tax."

The State Board of Equalization of the State of California in considering the question of intent said:

"Each of these cases involves taxing statutes of the Commonwealth of Massachusetts, and the Franchise Tax Commissioner seeks to differentiate the 'history' of the effort to reach tax exempt income by 'excise' taxation there and in California. We do not find the 'differences' urged particularly convincing. It is true that the taxation of income from exempt sources was sought to be accomplished in Massachusetts through amendment of an existing excise statute rather than through adoption of an entirely new law as in California. But to make this a vital point of difference would be virtually to hold that Massachusetts may not take in two bites what California may have in one."

Re Vortox Mfg. Co., (supra).

Even assuming that the intent of the legislature was a pertinent factor in the *Macallen* case, as to federal instrumentalities, the New York statute is in no better case in that respect than the Massachusetts statute.

In *People ex rel. Standard Oil Co.* v. *Law*, 237 N. Y. 142, the New York Court of Appeals held, as a matter solely of statutory construction, that "net income" as defined in Section 208, subdivision 3, did *not* include income from state and municipal bonds nor from *certain* federal bonds (though it *did* include income from certain other federal bonds; see page 147).

Thereafter, by chapter 329 of the laws of 1924 the New York legislature amended Section 208, subdivision 3, of the Tax Law so as to nullify the decision in *Peo. ex rel., Standard Oil Co.* v. *Law,* and *designedly reach*, in the language of the amended statute, "*ALL interest received from federal, state, municipal or other bonds.*"

By chapter 479 of the laws of 1927 the law was again amended, in Section 209, so as to reach "*income from any source.*"

New York thus did exactly what the Supreme Court in the Macallen case condemned Massachusetts for doing.

The New York State Tax Commission in its brief filed *amicus curiae* in the *Macallen* case insisted that the New York tax and the Massachusetts tax are identical in the particulars which were material to the *Macallen* decision (see quotation at pages 17 and 18, *supra*), and that "the New York legislature was actuated by the same motives as was the legislature of Massachusetts * * *."

The Court below (R., 58) said:

> "We think it now beside the point that the New York law as amended may, in so far as interest on federal bonds is concerned, be the result of motives not unlike those responsible for the Massachusetts law held invalid in the Macallen case. That question is not before us. Copyright income was not excluded from gross income in the exception in the federal law referred to in Peo. ex rel. Standard Oil Co. *v.* Law et al., supra".
>
> *Educational Films Co. of America* v. *Ward*, 41 Fed. (2d) 395, at p. 397.

But the fact that copyright and patent income was not excluded from gross income prior to the amendment following the *Standard Oil* case does not distinguish those federal instrumentalities from federal bonds; for *income from certain federal bonds was not excluded,* even prior to the amendment of 1924 (see *Peo. ex rel. Standard Oil Co.* v. *Law, supra,* at p. 147, referring to N. Y. Laws 1919, c. 726, §209 and §§213(a) and 213(b) of the federal Revenue Act of 1918).

Thus, any distinction between income from copyrights and income from federal bonds which is based on the New York legislative history, would logically require a distinction between interest on certain federal bonds and interest on certain other federal bonds.

The rather striking result of such a distinction would be that interest on some federal bonds would be constitutionally exempt from the New York corporation tax, while interest on other federal bonds would be subject to that tax.

The New York tax cannot, we submit, be an excise tax as to income from some federal instrumentalities and an income tax as to others.

A further attempt to distinguish the New York tax from the Massachusetts tax passed on in the *Macallen* case is that the income upon which the tax is based under the New York law is that for the *preceding* calendar or fiscal year. Under the New York law the tax is payable each year in advance for the year beginning November 1st. Thus, in paying its tax in New York a corporation is paying a tax for the succeeding year based on its income for the preceding year.

It might well be argued that this elaborate and artificial separation of *income year* from *tax year* indicates that the New York legislature in framing the tax law was deliberately trying to conceal the fact that it intended to tax *all* income—including exempt income.

Suffice it to say that, under the tax laws held unconstitutional in Washington and Tennessee the income upon which the tax is based is, as under the New York law, that of the *preceding year,* and the Supreme Court of each of those States, nevertheless, held the tax unconstitutional in so far as it reached exempt income. So, too, in California, the income upon which the tax is based is that of the preceding year and yet the State Board of Equalization expressed the opinion that the tax is unconstitutional.

There are at least four considerations not applicable to the Massachusetts tax indicating that the New York tax is a tax on income and not an excise or franchise tax:

(1) The New York law itself uses various expressions indicating that it is essentially a tax on income (See II, *supra*). The Massachusetts statute (G. L. Mass., c. 63, sec. 32 as amended by stat. 1923, c. 424, sec. 1) provides:

> " * * * every domestic corporation shall pay * * * *an excise* equal to * * * ". (Italics ours).

The Massachusetts statute by its own terms has greater claim to the characterization of an excise or franchise tax than the New York statute. And yet this Court held the Massachusetts statute in effect a tax on income so far as tax-exempt securities are concerned.

Macallen v. *Massachusetts,* 279 U. S. 620.

(2) In Massachusetts the highest court in that state held that the tax was an excise and not an income tax. In New York the Court of Appeals has held the tax to be "in practical operation a tax on income".

People ex rel. Alpha Port. Cement Co. v. *Knapp,* 230 N. Y. 48, 57.

See also

De La Vergne v. *State Tax Commission,* 211 App. Div. 227, aff'd 241 N. Y. 517.

And the New York Court of Appeals has at no time held that the tax is *not* a tax on *income*. This Court in *Bass* v. *Ratcliff* (*supra*) held that the tax was not a *direct* tax on *income*, but did not hold that it was not an *indirect* tax on *income*.

(3) The Massachusetts tax has that further attribute of being an "excise" in the strictest sense of the word, viz.: that it is collectible only when the corporation has in fact been engaged in doing business during the taxable year.

> *Massachusetts Gen. Laws* (1921) c. 63, §32.
> *Macallen* v. *Mass.* (*supra*), dissenting opinion (p. 635) citing
> *Fore River etc. Corp.* v. *Commonwealth*, 248 Mass. 137, 140.
> *Attorney General* v. *Boston etc. R. R. Co.*, 233 Mass. 460.

By contrast, the New York tax is levied upon every domestic business corporation, regardless of whether or not the privilege is availed of.

> *Article 9A, New York Tax Law, Sec. 209.*
> *People* v. *Jersawit*, 263 U. S. 493.

The New York tax on domestic business corporations is more nearly a burden on the corporation itself (as distinguished from a burden on what it does) than is the Massachusetts tax; and while the New York tax is labeled as being "*for* the privilege of exercising its franchise" the quoted words are in practical operation redundant, since the tax reaches *every* domestic business corporation, by reason of its mere existence as such.

In *People ex rel. Alpha Portland Cement Co.* v. *Knapp* (*supra*), the New York Court of Appeals held the New

York law to be unconstitutional in so far as the base includes income of a *foreign* corporation from federal bonds or other intangibles not included in the segregation formula saying (p. 62):

> "* * * the domestic corporation pays for the mere exercise of its franchise in a corporate capacity. In form, the tax is one upon the value of a privilege and income is nothing but the measure. In substance, as we have seen, it is the same as imposed directly upon income."

The Massachusetts tax, on the other hand, may be described exactly in the language in which the 1909 federal excise tax measured by corporate net income, was described in *Flint* v. *Stone-Tracy Co.* (*supra*):

> "* * * The tax is imposed not upon the franchises of the corporation, irrespective of their use in business (p. 145) * * * As was said in the Thomas case, 192 U. S. 363, the requirement to pay such tax involves the *exercise* of privileges and the element of *absolute and unavoidable demand* is lacking. *If business is not done* in the manner described in the statute, *no tax is payable* (p. 151) * * * The tax in this case, as we have construed the statute, is imposed upon the *exercise* of the privilege of doing business in a corporate capacity" (p. 155). (italics ours)

(4) Under the Massachusetts statute (G. L. c. 63, Sec. 32, as amended by St. 1923, c. 424, Sec. 1) the tax consists of two parts, viz.: (1) an amount equal to Five Dollars per thousand upon the value of the corporate excess, and (2) an amount equal to two and one-half per cent of that part of the net income which is derived from business carried on within the state.

In Massachusetts the tax is thus measured, only *in part*, by net income.

In New York the corporate net income (where that is the basis at all) constitutes the *sole* basis of the tax.

IV.

The decisions in Flint v. Stone-Tracy Co., 220 U. S. 107, and earlier cases are inapplicable to the New York statute here involved.

This Court said in the *Macallen* case (279 U. S. 620, at 628):

> "The Court below predicates its decision upon a series of decisions of which *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, is the *extreme example*, holding that a tax lawfully imposed upon the exercise of corporate privileges within the taxing power may be measured by income from the property of the corporation although a part of such income is derived from nontaxable property. See also *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611" (italics ours).

It will be noted that while the Court below regards the *Macallen* decision as *marking the limit* of what franchise taxes are to be condemned as reaching exempt income, (with the *Flint* case, apparently, as the norm), this Court refers (*supra*) to the *Flint* case as the *extreme example* of those which permit exempt income to be employed as a tax measure.

But the *Flint* case can readily be distinguished from the case at bar, even if it be regarded, after twenty years, as a modern authority.

The statute in the *Flint* case was, and was declared to be (pp. 144, 145):

> "* * * a special *excise* tax".

It was not, like the New York tax, one variously denominated "a tax based on income" or "a tax *upon* entire net income" payable *for* the privilege of exercising a

franchise and declared by the Courts to be "in practical operation a *tax on income.*"

Neither the statutory language nor any court decision admitted of any characterization of the tax in the *Flint* case as a tax *on* income, even an *indirect* tax on income.

The decision in the *Flint* case was based essentially on the fact that the tax there under consideration was an *excise*, which the court defined in the following language (p. 151):

> "The tax under consideration, as we have construed the statute, may be described as an *excise* * * * As was said in the *Thomas* case, 192 U. S. 363, the requirement to pay such tax involves the *exercise* of privileges, and the element of absolute and unavoidable demand is lacking. *If business is not done* in the manner described in the statute, *no tax is payable*" (italics ours).

As we have shown above (III, pp. 32 and 33, *supra*), the New York tax fails to meet the specifications of the definition of an excise as set forth in the *Flint* case, in that a domestic corporation is required to pay the tax regardless of whether or not it exercises the privilege, so that the tax burden is "absolute and unavoidable". That feature alone would seem completely to distinguish the case at bar from the *Flint* case.

Furthermore, unless the tax in the *Flint* case had been, of a certainty, an excise, and by no possibility a tax on income even "in substance and effect", it would have been *void in toto*—for at that time (1909) the Sixteenth Amendment had not been adopted.

On the other hand, there was no constitutional restraint on the New York Legislature in enacting a statute imposing a tax "essentially" on income, or even avowedly *on* income, except in so far as it assumed to include in its base income from exempt sources.

In the *Macallen* case (*supra*) this Court said (pp. 629, 631):

> "* * * the controlling principle, constantly to be borne in mind, is that the state cannot tax the instrumentalities or bonds of the United States, or, what is the same thing, the income derived therefrom, directly or indirectly; that is to say, it cannot tax *them* in any form * * * A liberal application of the foregoing principles, which find confirmation *especially in the later decisions of this court*, is essential to the preservation of the constitutional limitations imposed upon the taxing power of the states" (last italics ours).

Among the "later decisions of this Court" preserving, and we think expanding, the immunity from state taxation of federal instrumentalities, are the following:

In 1922, this Court in *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505, held unconstitutional a tax on the *net* income of the lessee of Indian lands (a federal instrumentality) and made a distinction (p. 505) between the relative immunity from state taxation of income from interstate commerce and the absolute immunity of income from instrumentalities of the United States.

In 1923, this Court in *Clallam County* v. *United States*, 263 U. S. 341, held unconstitutional a state tax on property owned by United States Spruce Production Corporation, a federal instrumentality.

In 1926, this Court in *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, held unconstitutional a property tax on coal mined from Indian lands.

In 1927, this Court in *Northwestern Insurance Co.* v. *Wisconsin*, 275 U. S. 136, held unconstitutional a state license fee measured by gross income including interest from federal bonds saying (p. 141) that the tax *amounted* to an imposition upon the bonds themselves, finding no inconsistency in its previous statement (247 U. S. 132, 137) that the same tax was a *privilege* tax.

In 1927, this Court in *Miller* v. *Milwaukee*, 272 U. S. 713, held unconstitutional a state tax on dividends in so far as they represented interest from federal bonds.

In 1928, this Court in *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, held a tax on the *privilege* of selling gasoline (though the *subject* was not immune), to be unconstitutional in so far as the tax was applied to and *measured* by the number of gallons sold to the United States Coast Guard (a federal instrumentality) saying at p. 222:

> "To use the number of gallons sold the United States as a *measure* of the privilege tax is in substance and in legal effect to tax the sale." (Italics ours).

In 1928, this Court in *Long* v. *Rockwood*, 277 U. S. 142, held unconstitutional a tax on net income in so far as it included royalties from patents, another federal instrumentality.

In 1928, in *National Insurance Co.* v. *U. S.*, 277 U. S. 508, this Court held unconstitutional a federal taxing statute in so far as it granted a statutory exemption to insurance companies merely as an *alternative*, rather than as an *addition* to, the exemption of their governmental bonds.

And, as we have seen, in 1929, this Court in *Macallen* v. *Massachusetts*, 279 U. S. 620, held unconstitutional an excise tax in so far as measured by net income, including interest on tax-exempt bonds, which it found to be in substance and effect a tax on the income itself.

In 1930, this Court, in *State ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, held unconstitutional a state tax in so far as the amount of certain statutory deductions was abated in the proportion that the federal securities of the tax payer bore to its total assets.

In the *Macallen* case the New York Tax Commission (appellees in the present case) filed a brief, as *amicus curiae*, insisting that whatever decision should be reached would "doubtless apply with like force to the State of New York" (p. 25 *supra*).

The States of Washington and California were also among those states which, as *amici curiae*, filed briefs in support of the petition for re-hearing in the *Macallen* case.

It is therefore of peculiar significance that, since the *Macallen* decision, the highest court of the State of Washington has held, concerning a privilege tax which is clearly more deserving of that characterization than the New York tax, that it is unconstitutional to the extent that it is measured by net income including income from federal bonds.

Aberdeen Savings & Loan Assn. v. *Chase, supra.*

And, also since the *Macallen* decision, the state of California, through its State Board of Equalization (*Re Vortox Mfg. Co., supra)* has likewise indicated strongly that the California franchise tax is to the same extent unconstitutional, and refrained from a definite ruling to that effect only because, as a non-judicial body, it lacked the power to overrule a statute of the state.

The highest court of the state of Tennessee, also since the *Macallen* decision, has reached the same conclusion with respect to an excise tax measured by net income from *patents.*

Quicksafe Mfg. Corp. v. *Graham (supra).*

Thus, in the only decisions of state courts or administrative bodies (except in New York), which we have been able to find, interpreting the *Macallen* decision, the necessary implication has been that the *Macallen* decision, in effect, overrules the decision in *Flint* v. *Stone-Tracy Co.*

But, we respectfully submit, it is not necessary for this appellant to rely upon the proposition that the *Macallen* decision definitely overruled the decision in *Flint* v. *Stone-Tracy.* As we have pointed out (p. 32, *supra)* the New York Tax Law is clearly to be distin-

guished from the federal excise tax which is the subject of the *Flint* decision.

It may also be pertinent to point out that when this Court, twenty years ago, decided the *Flint* case, excise taxes measured by corporate net income were virtually unknown to the states. Since that time, state after state has seen fit to base its corporation tax upon net income in lieu of all other taxes (except on real estate) with no apparent reason why they should declare such taxes, in form, to be excise taxes, rather than income taxes (as the present federal income tax is now declared to be) unless it be their purpose to include otherwise exempt income in the basis of the tax.

The federal government, by its candor in labeling its corporation tax an *income* tax, surrenders all claim to taxing corporate income from *state* instrumentalities. Some of the states, by a like candor in labeling taxes based on corporate net income, have admitted that corporate income from *federal* instrumentalities (like individual income therefrom) is beyond their power to tax. Should others of the states, by adopting a less candid label, be permitted *in effect* to tax income from federal instrumentalities?

The *Flint* case deals with the question of the immunity of income from *state instrumentalities* from federal taxation, rather than with the immunity of *federal instrumentalities* from state taxation. That this of itself might be the basis of a possible distinction is indicated by the following language of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat, 316, 435:

> "The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole."

The earlier cases, so much relied upon to defend state encroachments upon the federal domain, viz.: *Home Ins.*

Co. v. *New York* (1889) 134 U. S. 594; *Society for Savings* v. *Coite,* 6 Wall. 594; and *Provident Institution* v. *Massachusetts,* 6 Wall. 611, are clearly distinguishable from a case where a tax is based on net income including income from a federal instrumentality.

In both the *Coite* case and the *Provident* case, the tax is measured by *deposits,* so that the federal instrumentalities involved (federal bonds) were not *included* in the measure of the tax. Deposits are liabilities, viz.: debts owing by a bank to its depositors. If the state tax in those two cases had been measured by assets (including federal bonds) instead of by liabilities (deposits) the ruling of this Court would no doubt have been different.

In the *Home Insurance* case the measure of the tax was the *capital stock* of the corporation, which might or might not have a direct relationship to the amount of its federal bonds.

In short, in not one of the three cases last above cited was there the objectionable relationship between the exempt federal instrumentality and the measure of the tax, viz.: that the former was *included* in the latter.

But in every one of the cases which we have cited in support of appellant's contention, the exempt federal instrumentality was *included* in the measure of the tax, if not actually in the very subject of the tax. In every instance net income was either the subject or the measure of the tax, and in every instance the exempt federal instrumentality was definitely included in the net income, so that an increase in the amount of the former would be followed by an identical increase in the amount of the latter and by an exactly proportional increase in the amount of the tax based on the latter.

But if a bank were suddenly presented, on the day before the "tax day", with a $10,000 federal bond, or a patent worth $10,000, the gift would not increase by even one cent the amount of its deposits, or the amount of the tax measured thereby. Capital stock, which was used

as a measure in the *Home Insurance* case, would not *necessarily* be increased by a sudden increase in the amount of federal instrumentalities owned by the taxpayer, or the income therefrom. There was no direct or necessary relationship between the measure of those taxes and the extent or amount of the federal instrumentalities.

But in all cases, like the case at bar, where the tax is either measured by or based on the net income, every dollar of added income from federal instrumentalities automatically and inevitably results in the addition of one dollar to the measure of the tax, and in the addition of an exactly proportional amount to the tax to be paid (in this case four and one-half cents).

V.

The fact that the basis of the tax is net income rather than gross income does not justify the inclusion of income from federal instrumentalities.

Where immunity of income from *federal instrumentalities* is involved no distinction is made between taxes based on *net* income and taxes based on *gross* income.

> *Macallen* v. *Massachusetts*, 279 U. S. 620;
> *Gillespie* v. *Oklahoma*, 257 U. S. 501, 504, 505;
> *Aberdeen Savings and Loan Ass'n* v. *Chase*, 57 Wash. 255; 289 Pac. 536;
> *Quicksafe Mfg. Corp.* v. *Graham*, (Tenn.) 29 S. W. (2d) 253.

The distinction between net and gross income made in *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, and *Shaffer* v. *Carter*, 252 U. S. 37, does not apply where immunity from taxation from *federal instrumentalities*

is involved. Those cases have to do with an immunity of lesser degree: that of income from interstate commerce.

This Court said in *Gillespie* v. *Oklahoma*, 257 U. S. 501, at 504, 505:

> "The argument for the State is based primarily upon the cases sustaining taxes upon net income that include gains from interstate commerce, *Shaffer* v. *Carter*, 252 U. S. 37, 57; *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321; when 'all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses.' * * * Those decisions appear to us to have been correct. The criterion of interference by the States with interstate commerce is *one of degree*. It is well understood that a certain amount of reaction upon and interference with such commerce cannot be avoided if the States are to exist and make laws. *New York, New Haven & Hartford R. R. Co.* v. *New York*, 165 U. S. 628. *Diamond Glue Co.* v. *United States Glue Co.*, 187 U. S. 611, 616. The rule as to *instrumentalities of the United States on the other hand is absolute* in form and at least stricter in substance. *Williams* v. *Talladega*, 226 U. S. 404, 416, 417, 419. *Johnson* v. *Maryland*, 254 U. S. 51, 55." (Italics ours.)

It is true that the *Gillespie* case (*supra*) deals with a *direct* tax on net income, rather than with an excise tax based on net income, but in each of the other three recent cases cited above (the *Macallen* case, the *Aberdeen* case and the *Quicksafe* case) a corporate excise tax based on *net* income was held invalid in so far as it was based on income from federal instrumentalities.

Northwestern Ins. Co. v. *Wisconsin*, 275 U. S. 136, declared unconstitutional a license fee based on gross income to the extent that the income included interest on federal bonds, and made a distinction (at page 140) between net receipts and gross returns as a permissible measure of such a tax, citing two cases where income

from federal instrumentalities was *not involved*. But in view of the cases above cited the distinction, which was *obiter dictum* in the *Northwestern* case, would seem to be unnecessary, at least so far as *income from federal instrumentalities* is concerned.

VI.

Income from royalties on copyrights owned by plaintiff, including income from those registered in the names of others, as well as income from those registered in plaintiff's own name, is equally entitled to exemption from the state tax.

This question is not material here in determining whether the decree appealed from should be reversed or affirmed, because *some* of the copyrights owned by plaintiff were also *registered* in plaintiff's name. The question, at most, affects only the *amount* of the exempt portion of the tax complained of.

The court below has not ruled against appellant on this question. But the question is here discussed because, as we are informed, *appellees* will raise it, and this Court may desire that the lower court be instructed thereon, if the decree be reversed.

The *facts* are not now in issue, the bill having been dismissed on motion, before the joining of issue.

There is no justification for the assertion which appellant made in the Court below and will presumably make in this Court, viz.: that in computing the tax "has deducted income from copyrights which it did not *own*."

Any person may obtain a valid copyright, and become the legal or nominal owner thereof, holding the copyright *in trust* for the actual or equitable owner.

Harms et al. v. *Stern*, 229 Fed. 42 (C. C. A. 2d);

Bisel v. *Laduer*, 1 F. (2d) 436 (C. C. A. 3rd), and cases cited;

Harper v. *Donohue*, 144 Fed. 491, 494, affd. 146 Fed. 1023;

White-Smith Co. v. *Apollo Co.*, 139 Fed. 427 (S. D. N. Y.) affd. 147 Fed. 226, affd. 209 U. S. 1.

The law on that subject is succinctly stated in *Harms et al.* v. *Stern et al., supra*, quoted in *Bisel* v. *Lanner, supra*, as follows:

> "* * * the question of true ownership is one of *fact*, dependent upon the circumstances of the case. *Press Publishing Co.* v. *Falk*, 59 Fed. 324; *Black* v. *Allen Co.*, 42 Fed. 618, 9 L. R. A. 432; *Lawrence* v. *Dana*, Fed. Cas. No. 8136, 9 Cyc. 930." (Italics ours.)

There is no principle of *law* which in any way discredits appellant's flat and positive sworn allegation (R., 5) "that during the fiscal year ending June 30, 1929 *plaintiff* was the owner and proprietor * * * " of the copyrights listed in Schedule A.

Nor are any *facts* advanced which in any way discredit appellant's allegation of ownership, or require the slightest qualification or modification of that allegation.

Nor is there any contradiction of the positive and unqualified allegation by appellant, under oath, that appellant

> "as *such owner* had the exclusive right to project and exhibit said films or production and to license the same for projection or exhibition" (R., 5).

Nor is there the slightest contradiction of appellant's sworn allegation (R., 5, 45) that *appellant*

> "* * * licensed same to sundry exhibitors for projection and exhibition and received substantial sums from said exhibitors as royalties under said copyrights, to wit, the sum of $162,-

> 588.98, which constituted *plaintiff's* income from said copyrights."

Not only are the foregoing allegations of the bill of complaint uncontradicted, but the moving affidavit of appellant's treasurer, while conceding that certain of the copyrights were held in the *name* of other corporations, affiliated with appellant, avers that

> "* * * *all* of said copyrights, however, whether or not standing in the name of plaintiff corporation are and were during the period aforesaid *owned by plaintiff corporation*" (R., 45).

While, in view of the well-settled law, and appellant's positive and unqualified allegations of ownership, it was not required that appellant offer any explanation of its *reasons* for having some of its copyrights registered in the name of other corporations, the reason is made apparent by the undisputed statement in the moving affidavit (R., 45) that the *nominal owners* were

> "* * * corporations handling the production thereof upon plaintiff's order and at plaintiff's expense."

It is undisputed that *plaintiff* "paid the costs of production thereof", and that *plaintiff* had "exclusive control and disposition thereof", and that *plaintiff* was "entitled to *all* the income therefrom except certain agreed commission and percentages."

It is also undisputed (R., 45) that

> "*Plaintiff's* gross income during said period, to the amount of $162,588.98, consisted of royalties received by *plaintiff* from said copyrights under so-called license contracts entered into between *plaintiff* and various exhibitors of motion pictures, whereby *plaintiff*, in consideration of the payment of said royalties, granted unto said ex-

> hibitors the right, for certain specified periods and in certain specified theatres or localities, to project and exhibit said copyrighted motion picture productions under said copyrights." (Italics ours).

Not only was plaintiff the actual owner, which had caused the copyrighted films to be produced at its expense, and was entitled to receive, and did receive, all the income therefrom, but plaintiff was in every instance the party (licensor) which, under the uniform contract, Exhibit "C", granted to the exhibitors the license under the various copyrights to exhibit the films.

> " * * * all of *plaintiff's* said income from said copyrights having during said period been paid to and received by *plaintiff* from licensees under contracts in that form" (R., 45).

Other instances where copyrights have been registered in the *name* of one person, and *actually owned* by another person, are found in the following cases:

> *Mifflin* v. *R. H. White Co.*, 190 U. S. 260, 263;
> *Brady* v. *Reliance Motion Picture Corp.*, 232 Fed. 259, 260;
> *Dam* v. *Kirk LaShelle Co.*, 175 Fed. 902, 905.

In the last-cited case the Circuit Court of Appeals for the Second Circuit quotes with approval *Drone on Copyright*, page 260, in part as follows:

> "A person who is not the author or owner of a work may take out the copyright in his own name, and hold it in trust for the rightful owner."

The various affiliated corporations who registered appellant's copyrights in their names of course did so with appellant's consent.

It is true that in an explanatory statement annexed to appellant's return it stated that the copyrights were

"owned by it *or its affiliated companies*". The word "owned" in that document was used in the sense of legally or nominally owned. The fact, however, that the return set forth that it was appellant which received the royalties under such copyrights and claimed constitutional immunity from taxation thereon, must have prevented defendants from being misled by the quoted expression.

However that may be, there was no possible ambiguity or doubt in the sworn allegations of the *bill of complaint* (R., 5) and moving affidavit (R., 45), and at the invitation of the State Tax Commission a formal hearing has been had before that body since the bill of complaint was filed herein, and *on demurrer* the allegation of ownership stands undisputed.

Such allegation also stands admitted for the purposes of appellees' cross-motion to dismiss the bill of complaint, in which all the allegations of the bill are taken as true.

Appellees will have an opportunity if they believe the facts support them, to deny such allegations in whole or in part in their answer, and to offer evidence on these issues at the trial, if there be such evidence.

VII.

All appellant's expenses, including those incurred in procuring the exempt income, as well as those incurred in procuring taxable income, are deductible from gross income in calculating that portion of appellant's net income which is subject to the tax.

This point, like the preceding point, is not material in determining here whether the decree below should be reversed or affirmed. It affects only the *amount* of the exempt portion of the tax complained of.

The court below in its opinion (R., 55) said:

> "The facts are not in dispute. The plaintiff is a domestic business corporation subject to be taxed under the New York law as the tax is constitutional. Its income during the year in question consisted in part of $162,588.98 derived solely from copyrights granted by the United States on motion picture films. Its expenses in procuring this part of its income were $49,151.37 leaving its net copyright income $113,437.61."

Since the court below did not rule against appellant's contention, no error has been assigned with respect to the amount of expenses which should be deducted. But, as we are informed, appellees will present that question to this Court, presumably with the hope that this Court, in the event of reversal, will desire to instruct the lower court in its further proceedings.

Without conceding any relevancy to the fact, appellant, by stipulation, amended its bill so as to allege that part of its expenses for the fiscal year, to the extent of $49,151.37, were incurred in procuring the income for which immunity is claimed.

Appellees contend that if the $162,588.88 of royalty income be excluded, the $49,151.37 of expenses in procuring that income cannot be allowed as a deduction.

Appellant contends, on the contrary, as was successfully contended by the tax-payer in *National Ins. Co.* v. *United States*, 277 U. S. 508, at pages 511 and 513, that:

> "* * * the exempted income must be, for purposes of taxation, treated as *non-existent* * * * and that the State * * * cannot annex to the privilege of a *deduction* the surrender or subtraction of the constitutional privilege of tax *exemption*." (Italics ours).

Citing

Terral v. *Burke Construction Co.*, 257 U. S. 529.

Both appellant and appellees necessarily *assume*, for the purpose of discussing this point, that the Court holds that the royalty income may not be included in the measure of the tax. In view of that assumption we think that the above-cited *National Insurance Company* case is exactly in point.

It was there held that the taxpayer was entitled to all statutory deductions *in addition* to the privilege of excluding from its gross income whatever elements of income consisted of income derived from tax exempt sources (in that case interest from exempt state, municipal and United States bonds). The Court said (p. 522):

> "Congress had no power purposely and directly to tax state obligations by refusing to their owners deductions allowed to others. * * * We think that provision of the Act which undertook to abate the 4% (statutory) deduction by the amount of interest received from tax exempt securities cannot be given effect. * * *"

The contention vigorously developed in the dissenting opinion that there is a distinction between imposing a burden and withholding a favor was overruled by the majority of the court, as was the contention that the taxpayer's only complaint (p. 535) was that Congress had not granted it as large an exemption as it had accorded to others receiving no income from tax exempt sources.

By Section 209 of the New York Tax Law the Franchise Tax is based on the corporation's net income,

> " * * * which entire income is presumably the same as the entire net income which such corporation is required to report to the United States."

Section 23 of the federal Revenue Act of 1928 provides as follows:

"In computing net income there shall be allowed as deductions:

(a) *Expenses—all* the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business * * *"

It will be noted that the above-quoted provision of the federal statute—adopted by the state statute—in no way distinguishes between expenses incurred in procuring *non-taxable* income from expenses incurred in procuring *taxable* income. On the contrary, the statute, without qualification, allows the taxpayer, in computing its net income "*all* the ordinary and necessary expenses paid or incurred during the taxable year."

It is, of course, an elementary principle of the construction of tax statutes that every doubt and ambiguity is to be resolved in favor of the taxpayer.

Gould v. *Gould*, 245 U. S. 151, 153;
U. S. v. *Field*, 255 U. S. 257;
Smietanka v. *Savings Bank*, 257 U. S. 391.

It is equally well settled that no burden can be imposed upon a taxpayer, and no statutory exemption, deduction or privilege *withheld* from a taxpayer by implication, or by so-called "equitable" construction. The taxpayer is in every case entitled to the benefit of the letter of the statute.

U. S. v. *Merriam*, 263 U. S. 179.

The plain language of the statute accords to the taxpayer a deduction equal to the full amount of all its ordinary and necessary expenses.

The federal constitution, as we contend and as is assumed for the purposes of this point, accords to the taxpayer a complete exemption from the measure of the tax of that portion of its gross income which consists of income from federal instrumentalities.

The effect of the constitutional exemption upon the computation of the tax is as though the exempt income were totally non-existent—yet the statutory deduction, being in no wise limited to expenses incurred in the procuring of non-taxable income, is something to which the taxpayer is entitled under all circumstances—and which cannot be withheld from the taxpayer by departing from the plain language of the taxing statute.

If, as we assume at this point, we have excluded from gross income all such income as is derived from federal instrumentalities, then there is no further constitutional limitation upon the State of New York as to its use of the remaining income, *whether gross or net,* as the basis of the tax.

The state may (so long as it does not infringe on constitutionally exempt income) measure its tax by gross income (as in the Wisconsin tax considered in *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136) or it may measure the tax by the corporation's *net income*, as in the case of the New York tax and the tax of many other states.

In either case the federal constitution is not brought into question, so long as income from federal instrumentalities is not used as a measure of the tax. With that sole qualification, it is a matter for the state legislature to determine what, if any, *deductions* are to be permitted to the taxpayer. The legislature may decide not to allow any deductions whatsoever and to measure the tax by *gross* income (so long as exempt income be excluded), or it may pick and choose what particular deductions it will allow.

The New York legislature might, for example, have limited the deductions to expenses incurred in the procuring of *taxable income. But it has not elected to do so.* It has allowed the taxpayer the same deductions that is allowed by the Federal Revenue Act, viz.: a deduction for *all* the ordinary and necessary expenses—not limited to expenses in procuring *taxable* income.

Section 23, subdivision b of the federal act, which denies to the taxpayer a deduction for interest on indebtedness incurred in the purchase of tax-exempt bonds will perhaps be cited by appellees. Instead of supporting the appellees' contention, it seems to us that this statutory reference, on the contrary, supports the appellant's contention, because it emphasizes the fact that an express provision of the statute is needed in order to deny to the taxpayer the benefit of a deduction for expenses involved in the production of non-taxable income.

We submit that it is obvious, and must be conceded, that if it were not for the exception contained in Section 23-b of the federal Revenue Act the taxpayer would be entitled not only to exclude from the gross income the interest received by him from federal bonds, but would *also* be entitled to include as part of his statutory deduction the interest paid by him in purchasing or carrying such tax-exempt bonds.

The reason he may not do the latter is that an express provision of statute forbids him to.

If the appellees could point to a specific provision of the statute (as they can in the case of interest in carrying tax-exempt bonds) denying to the taxpayer the benefit of a deduction for *other* expenses incurred in the producing of income from a tax-exempt source, there might be some point to their contention, but in the absence of such specific provision of statute, the appellees must need fall back on construction, implication, and straining of plain language, all of which are excluded by the well-settled rule (above referred to) that no burden may be imposed upon or deduction, exemption or privilege withheld from, the taxpayer by statutory construction involving departures from the express language of the act.

Appellees may argue that if the taxpayer's constitutionally exempt income be excluded from the measure

of the tax without a corresponding denial of the deduction expressly allowed by statute, the result might be to relieve the taxpayer "* * * from the payment of *any* tax although it had enjoyed privileges granted by the state." Such would in no event be the result of the application of what we consider obvious principles of constitutional immunity and statutory construction, because every corporate taxpayer, if there be no net income available for the measure of its tax, is subjected to a tax at the rate of one mill upon every dollar of its issued capital stock under Section 214, subdivision 8, of the New York Tax Law, or a tax at the rate of two percentum on salaries and other compensation paid to all its elected or appointed officers and to any stockholders owning in excess of 5 per centum of the issued capital stock of the corporation, under subdivision 10, *whichever would result in the largest amount of tax.*

Thus, by no possibility, can this taxpayer or any other corporate taxpayer escape the payment of a substantial tax to the state of New York.

Appellant contends merely that the state must have regard for plain and well-established constitutional principles in measuring the tax, and if it be necessary to correct its taxing system so as to adjust the permissible deductions to the operation of federal immunities, it must do so by *legislation* directed to that end, and not by appeal to the courts to render aid to the taxing power, which the legislature has failed to render.

We respectfully submit, therefore, that this taxpayer is entitled to have its entire royalty income excluded from the measure of the tax, and is nevertheless entitled to the benefit of the full deduction allowed by it by Section 209 of the New York Tax Law, referable to Section 23, Subdivision a, of the federal Revenue Act of 1928.

VIII.

Since the New York Tax Law does not furnish an adequate legal remedy for the recovery back of the tax, if paid, injunctive relief is appropriate.

While disputing the merits of appellant's constitutional contention, neither the appellees nor the Court below have questioned that this suit for injunction is an appropriate means for asserting that contention.

We of course realize that, regardless of the merits of his constitutional assertion, a taxpayer is not entitled to injunctive relief until he has first asserted his rights before the appropriate taxing authorities and exhausted his administrative remedy (where one is provided).

> *Gorham Mfg. Co.* v. *Tax Commission*, 266 U. S. 265.

Appellant in this case asserted its constitutional rights, clearly and specifically, in its return, with a sworn statement of the relevant facts (R., 42, 48, Exh. B, opp. R., 40) and its contentions were definitely overruled by the Tax Commission not only in this case of the appellant, but, as an announced policy, in all cases presenting the identical constitutional question (R., 9, 48); so that appellant, under the authorities, was not, as a condition of injunctive relief, required to make a further, necessarily futile, application to the Tax Commission for a revision of the assessment, which would have been an idle form.

> *Montana Bank* v. *Yellowstone County*, 276 U. S. 499, 505;
> *Munn* v. *Des Moines Bank*, 18 F. (2d) 269, 274;
> *Procter & Gamble Co.* v. *Sherman*, 2 F. (2d) 165, 167.

In the *Gorham* case (266 U. S. 265, *supra*) the taxpayer had not availed itself of its administrative remedy. In that case this Court decided against the taxpayer, on the merits, as to the constitutional question and also said, *obiter dictum*, that the bill was properly dismissed by the District Court because of the failure of the company to avail itself of the administrative remedy provided by the statute for the revision and correction of the tax.

However, as was emphasized by the Court, the company "*did not report* to the commission any of the facts upon which it now challenges the validity of the tax". The Court said that "*under these circumstances* the company having failed to avail itself of the administrative remedy was not entitled to maintain a bill in equity."

Furthermore, after the present suit was commenced and before it was heard below, the Tax Commission offered appellant a hearing, and a hearing was had, and the assessment was affirmed (R., 51, 52).

There seems to be no doubt, or controversy, as to the inadequacy of the legal remedy furnished to the taxpayer by the New York Tax Law for the recovery back of his tax after he has once paid it.

There are at least *four* different respects in which the remedy at law afforded by the New York Tax Law to an aggrieved corporation taxpayer is inadequate, any *one* of which would alone be sufficient to show the taxpayer to be entitled to equitable relief. The statutory remedy at law is inadequate because

1. although payment is a condition precedent of judicial review no interest is allowed;

2. even though the Court should hold the tax illegal, refund cannot be compelled as a matter of certain, legal right;

3. the remedy is not available in the federal courts; and

4. the procedure is not prompt and practicable but is, particularly in actual practice, dilatory, burdensome, impractical and uncertain.

The remedy afforded by the statutes of New York State to a corporate taxpayer who complains that a franchise tax assessed against it under Article 9-A of the Tax Law is illegal, is found in Sections 218, 219, and 199.

Under Section 218 the corporation may within one year from the "auditing and stating of the account" (notice of assessment) apply to the state tax commission for revision, and the commission shall grant a hearing thereon. Under Section 219 the commission's determination may be reviewed in the manner (certiorari) prescribed by and subject to the provisions of Section 199.

(It should be noted that before certiorari can be granted to the taxpayer the commission must first have granted a hearing, and then have made its determination, conditions precedent which are not within the control of the taxpayer and which we shall discuss below.)

Under Section 219 the full amount of the tax, interest and other charges audited and stated in such account *must be deposited* with the commission *before making the application* (for certiorari), and an undertaking must be filed for the payment of costs in the prosecution of the writ, and all appeals.

From the determination of the Supreme Court an appeal, under Section 199, may be taken to the Court of Appeals by either party.

If the determination of the Court of Appeals is adverse to the taxpayer, and it claims a violation of its

rights under the federal constitution it may then seek redress in the United States Supreme Court, but only after (a) being granted a hearing by the commission, (b) obtaining a determination by the commission, (c) depositing the tax and filing an undertaking, (d) certiorari proceedings in the Supreme Court, and (e) review by the Court of Appeals.

If the taxpayer, pursuing the foregoing remedy shall ultimately succeed in obtaining a final judicial determination in its favor, the judgment will not be a judgment for the recovery of the deposited tax, but merely, under Section 199 a judgment that "the accounts reviewed shall then be corrected and restated."

Having, let us assume, been successful in the courts the taxpayer's chance of actually *obtaining refund* now depends upon the language of Section 219-d, which so far as here material provides as follows:

> "If from such reassessment it appears that such corporation shall have paid under this article an excess of tax for the year for which such reassessment is made, the tax commission shall *credit* such corporation with such amount. Such *credits may be assigned* (to another taxpaying corporation) * * * or, the amount of such credit, *without interest*, MAY *be refunded* to such corporation out of any revenues received under this article, to the credit of the state comptroller, *at the direction of the state tax commission.*" (Italics ours).

1. *The denial of interest is alone enough to entitle plaintiff to equitable relief.*

The taxpayer cannot obtain judicial relief without first depositing the tax, *with interest* (Section 219-d).

But any refund that it "*may* at the direction of the state tax commission" obtain, if the courts hold the tax illegal, will be *without interest*. The taxpayer will thus surely lose not only the interest deposited, but also all interest on its money from the time of the deposit until the uncertain date of refund.

And in the meantime the taxpayer will be obliged to wait until the commission grants it a hearing, and thereafter until the commission makes a determination, and thereafter (in all likelihood) until *three* courts have successively passed on its constitutional rights. The loss of interest will be substantial and irremediable.

The denial of interest alone entitles plaintiff to injunctive relief. With respect to that feature of the New York tax law, Judge Learned Hand in *Procter and Gamble Distributing Co.* v. *Sherman,* 2 F. (2d) 165, 166, said:

> "But, quite independently of such doubts, (as to certainty of refund) the relief is inadequate because of the express refusal to allow interest. It is no answer to say that interest is not allowed against the sovereign. * * *. The adequacy of the requisite legal remedy cannot be measured by the remedies one has against a person who is exempt from all process. If that were the test, the principal itself might be confiscated. While I have been referred to no decision on the point, it seems to me plain that it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he establishes that he ought never to have been required to pay at all. Whatever may have been our archaic notions about interest, in modern financial communities a dollar today is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and if I get no compensation for its loss, my remedy does not altogether right my wrong."

The decision in the *Procter and Gamble* case was approved and followed by the Circuit Court of Appeals for the 9th Circuit in the *Southern California Telephone Co.* v. *Hopkins*, 13 F. (2d) 814, aff'd. 275 U. S. 393, which held that the California statute which was then in effect (1926) did not afford the taxpayer an adequate remedy at law because it did not allow *interest* on the refund (citing *Birch* v. *Board of Supervisors*, 191 Cal. 235; 215 Pac. 903).

Subsequent to the holding of this Court that the California statute did not afford an adequate remedy at law because it did not allow interest on refunds, the California statute has been amended so as to include express provision for interest on refunds (Cal. L., 1929, Chap. 13, §27).

2. *The tax remedy under the New York Tax Law is inadequate since it does not, if successful, lead, as a matter of certain legal right, to the refund of the tax.*

As we have pointed out (*supra*) all that the tax-paying corporation accomplishes under the New York Tax Law, when it establishes in the courts the illegality of the tax, is that it receives a *credit* for the tax.

If, by chance, the tax for the next year, or the next two or three years in the aggregate, equals the amount of the illegal tax already paid, then the *credit* may have *some* value—though long deferred, and without interest.

But it may happen, and usually does, where a tax has been held illegal by the Courts, that next year's taxes (now legally assessed, we may assume) will be less, so as to take an indefinite number of years to "work off" the credit—or the corporation may go out of business. Under those circumstances a *credit* would be very far indeed from being the equivalent of a *refund*.

True, the corporation may *assign* its credit to another corporation.

But where is the *market* for buying and selling these credits? What advantage would the buyer have to inject itself into some other corporation's tax complications unless it could buy at a substantial discount?

Obviously, the *credit* which the corporation receives, after winning its case in the courts, is in effect *depreciated currency*. It is far different from a cash refund.

It must be admitted, of course, that "at the direction of the state tax commission" the amount of the credit, without interest, "*may* be refunded to the corporation" under Section 219-d of the Tax Law, and no doubt such refunds are frequently made.

But not only is there no decision of the court of last resort that "may" means "must" in that connection, but the succeeding language of 219-d shows that the actual cash refund to the taxpayer, besides being "at the direction" of the commission is contingent on the existence and amount of "*current* revenues credited to such taxing district" with the alternative of waiting for "*further* revenues credited to such taxing district", presumably in subsequent years.

In the only cases in which, so far as we can find, the effect of that feature of the New York Tax Law has been considered, it was held that the failure of the statute to direct a refund as a matter of right, makes the remedy *inadequate*.

In *Gorham Mfg. Co.* v. *Travis*, 274 Fed. 975, it was said (p. 976):

> "(1) The first question is of jurisdiction in equity. I should have thought the provisions for revision by the tax commission and certiorari to the Supreme Court adequate remedies at law, *Indiana Mfg. Co.* v. *Koehne*, 188 U. S. 681, 23 Sup. Ct. 452, 47 L. Ed. 651; *Boise, etc., Co.* v. *Boise*, 213 U. S. 276, 29 Sup. Ct. 426, 63 L. Ed. 796; *Dalton*

Machine Co. v. *Virginia*, 236 U. S. 699, 35 Sup. Ct. 480, 59 L. Ed. 797, except for one thing. Before applying for the writ, the taxpayer must 'deposit' the tax with the State Comptroller (Section 219), and there is no provision for getting it back. It is indeed a little strange that there should be doubt about this, but the only reported case, *In re Waterman*, 33 Misc. Rep. 569, 68 N. Y. Supp. 892, is flatly against any recovery. That was decided 20 years ago, and in spite of the suggestion there contained the Legislature has never seen fit to give power to a court to direct the Comptroller to pay back the money. The defendants say that the Appellate Divisions have frequently so decided, but they cite no cases. When a tax statute expressly directs the Comptroller to refund, it is true that the courts will compel him to do so, *People ex rel. Millard* v. *Chapin*, 104 N. Y. 100, 10 N. E. 141; *People ex rel. Ostrander* v. *Chapin*, 109 N. Y. 177, 16 N. E. 331, and such an act is constitutional, *People ex rel. Evans* v. *Chapin*, 101 N. Y. 682, but here there is no act. The matter at best rests in inference. The situation is therefore closely analogous to *Dawson* v. *Kentucky, etc., Co.*, 255 U. S. 288, 41 Sup. Ct. 272, 65 L. Ed. 638, Supreme Court, February 28, 1921, where indeed there was a statute directing a refund, though the state authorities were ambiguous. That case I think rules, and shows that here an adequate remedy at law is not clear enough."

In the *Gorham* case, *supra*, this court, after holding the state remedy inadequate, dismissed the suit on the merits, and the judgment was affirmed (266 U. S. 265) without in any way affecting Judge Hand's ruling that the Tax Law does not furnish an adequate remedy at law.

For the same reason this Court in *Dawson* v. *Kentucky Distilling Co.*, 255 U. S. 288, held that a certain Kentucky statute did not afford the taxpayer an adequate remedy at law because, in the absence of an authoritative

interpreting decision, it was *uncertain* whether or not the taxpayer could compel the refunding of the tax after the courts had established its illegality.

Even though the Kentucky Court of Appeals, between the filing of the bill and the hearing in this Court, interpreted the statute favorably to the taxpayer, nevertheless the taxpayer's right to equitable relief was upheld on the ground that, at the time the bill was filed, the taxpayer's right was not clear and certain.

The question was presented again in 1924 in *Procter and Gamble Co.* v. *Sherman*, 2 F. (2d) 165, and again it was held that the remedy is not adequate, for the same reason, as well as for the reason that no interest is allowed (which we discuss below). The Court said, at page 166, with reference to the point now under consideration:

> "* * * section 218 of the New York Tax Law, even as amended (Laws 1920, c. 640, §7, Laws 1921 c. 443, §8; Laws 1922, c. 507, §5) does not, in my judgment, give an adequate remedy at law. While the word 'may' in the clause 'may be refunded to such corporation', probably refers to the taxpayer's option, that is, he may either assign the credit or get the cash, the phrase 'at the direction of the state tax commission' is to me ambiguous. The language as a whole leaves it uncertain whether the taxpayer could compel a refund, if the commission opposed him. * * * "

Uncertainty, under the statute, of right to compel refund was held to be a ground for equitable relief in *Hopkins* v. *Southern California Tel. Co.*, 275 U. S. 393, at page 399.

3. *The New York remedy by certiorari is inadequate because it is not available in the federal courts.*

It is well settled that a remedy at law for the recovery back of a tax illegally exacted is not adequate unless it is available to the taxpayer (assuming the existence of

a federal question or diversity of citizenship) in the *federal* courts.

> *Chicago B. & Q. R. R. Co.* v. *Osborne*, 265 U. S. 14;
>
> *Bohler* v. *Calloway*, 267 U. S. 479;
>
> *Risty* v. *Chicago etc. Co.*, 270 U. S. 378, 388;
>
> *So. Ry. Co.* v. *Query*, 21 F. (2d) 333 (E. D. S. C.);
>
> *Henrietta Mills* v. *Rutherford Co.*, 32 F. (2d) 570, C. C. A. 4th.
>
> *Munn* v. *Des Moines National Bank*, 18 F. (2d) 269, C. C. A. 8th.

Even though the taxpayer's rights under the United States constitution be violated or there be diversity of citizenship, or both, the New York remedy at law (by certiorari) is obviously not available in the federal courts. Therefore, under the well-established rule, it is not such "adequate remedy at law" as will prevent equitable relief by injunction.

The remedy at law in South Carolina is by *mandamus*. That was held inadequate in *Southern Ry. Co.* v. *Query* (*supra*).

For the same reason the remedy at law in North Carolina was held inadequate in *Henrietta Mills* v. *Rutherford County* (*supra*) in which the Circuit Court of Appeals for the Fourth Circuit said (p. 572):

> "Furthermore, it is well settled that a federal court of equity may properly interfere to restrain the violation of a taxpayer's rights by an unconstitutional exercise of the taxing powers, unless there be a plain, adequate, and complete remedy at law available to the taxpayer *in the federal court*. *Cummings* v. *Merchants National Bank of Toledo*, 101 U. S. 153, 157 (25 L. Ed. 903); *Raymond* v. *Chicago, etc., Co.*, 207 U. S. 20, 28 Sup. Ct. 7; *Southern Ry. Co.* v. *Query*, (D. C.), 21 F. (2d) 333; *Chicago, B. & Q. R. R. Co.* v. *Os-*

borne, 265 U. S. 14, 44 Sup. Ct. 431; *Risty* v. *Chicago R. I. & P. R. Co.*, 270 U. S. 378, 388, 46 Sup. Ct. 236; *Bohler* v. *Callaway*, 267 U. S. 479, 45 Sup. Ct. 431." (Italics ours.)

This Court in *Risty* v. *Chicago B. & Q. R. R. Co.* (*supra*) said (p. 388):

> "* * * the test of equity jurisdiction in a Federal court is the inadequacy of the remedy on the law side *of that court* and not the inadequacy of the remedies afforded by the state courts. *Smyth* v. *Ames*, 169 U. S. 466; *Chicago B. & Q. R. R. Co.* v. *Osborne*, 265 U. S. 14.
>
> "It does not appear that the state law affords a remedy by payment of the assessment and suit to recover it back, which, if it exists, can be availed of in the Federal courts. *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, 486." (Italics ours.)

In *Chicago B. & Q. R. R. Co.* v. *Osborne* (*supra*) this Court said (p. 16):

> "* * * a remedy in the state courts only has been held not to be enough."

4. *The remedy at law afforded by the New York Tax Law is not as practical, efficient and prompt as the remedy in equity.*

The *conditions precedent* to obtaining a writ of certiorari under the New York Tax Law—particularly as it is applied in practice—are such as to make the remedy dilatory, uncertain, impractical, inefficient and burdensome (R., 8, 9, 48).

It is an absolute condition precedent to obtaining judicial relief that the taxpayer must first succeed in persuading the State Tax Commission to grant a formal hearing (no matter how definitely it has ruled against the taxpayer), and must thereafter persuade the commission to make its formal determination thereon.

Those conditions precedent are beyond the control of the taxpayer, and, as the affidavits show, hearings are in practice indefinitely and arbitrarily postponed, with no assurance of relief.

The attitude of the federal courts on that question is well typified by the opinion of the Circuit Court of Appeals (Eighth Circuit) in *Munn* v. *Des Moines Bank*, 18 F. (2d) 269 (*supra*). The Court said (pp. 271-272):

> "The adequate remedy which will prevent the maintenance in this court of equity of these suits must be 'as practical and efficient to the ends of justice and its prompt administration, as the remedy in equity'. *Boyce* v. *Grundy*, 3 Pet. 210, 215; *Oelrichs* v. *Spain*, 15 Wall. 211, 228; *Hayden* v. *Thompson* (C. C. A.), 71 Fed. 60, 63; *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1; *St. Louis Ry. Co.* v. *McElven*, 253 Fed. 123, 135. Such a remedy must also be a legal remedy in the federal court, not merely in a state court. *National Surety Co.* v. *State Bank* (C. C. A), 120 Fed. 593; 61 L. R. A. 394; *Brun* v. *Mann* (C. C. A.), 151 Fed. 145, 12 L. R. A. (NS) 154; *Franklin* v. *Nevada Power Co.* (C. C. A.) 264 Fed. 643, 645."

CONCLUSION.

The decree of the District Court should be reversed, with leave to defendants-appellees to plead over, and an interlocutory injunction should be granted restraining the collection of the tax complained of to the full extent demanded in the bill of complaint, viz. to the extent of $7,316.51.

Respectfully submitted,

Roger Hinds

BENJAMIN P. DEWITT,
ROGER HINDS,
SIEGFRIED F. HARTMAN,
of Counsel for Appellant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 350

EDUCATIONAL FILMS CORPORATION OF AMERICA,
Appellant,

against

HAMILTON WARD, Attorney General of the State of New York, and THOMAS M. LYNCH, JOHN J. MERRILL and MARK GRAVES, comprising the NEW YORK STATE TAX COMMISSION,

Appellees.

BRIEF FOR APPELLEES

HAMILTON WARD,
Attorney General of the
State of New York.

WENDELL P. BROWN,
Third Assistant Attorney General,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

No. 350

EDUCATIONAL FILMS CORPORATION OF AMERICA,
Appellant,
against
HAMILTON WARD, Attorney General of the State of New York, and THOMAS M. LYNCH, JOHN J. MERRILL and MARK GRAVES, comprising the NEW YORK STATE TAX COMMISSION,
Appellees.

BRIEF FOR APPELLEES

The Opinion of the Court Below.

The opinion in the District Court, Southern District of New York, is reported in 41 F.(2d) 395, and appears at pages 53-58 of the transcript of record.

A review of the opinion appeared in the Columbia Law Review for November, 1930 (XXX Columbia Law Review 1070-1071) and is printed as an appendix to this brief (p. 46).

Statement of the Case.

This suit was brought under Judicial Code, § 24 [28 U. S. C. A. § 41 (1)], to enjoin the defendants, public

officers of the State of New York charged by law with the duty of assessing and collecting taxes due the State, from collecting a certain corporate franchise tax assessed against the plaintiff-appellant under the provisions of Article 9-A of the New York Tax Law. The plaintiff asserted the unconstitutionality of the statute in so far as it permits the inclusion of income received from the rental of copyrighted motion picture films in the net income which furnishes the measure of the tax. Plaintiff moved for an interlocutory injunction. Defendants moved for the dismissal of the bill of complaint, as amended, upon the ground that it did not state facts sufficient to constitute a cause of action. The motions were heard pursuant to § 266 of the Judicial Code (28 U. S. C. A. § 380) by a statutory court of three judges, which on June 10, 1930, denied the plaintiff's motion for an interlocutory injunction and dismissed the amended bill of complaint upon the merits. From that order, the plaintiff has appealed to this court.

The Statute

Article 9-A of the New York Tax Law imposes an annual franchise tax upon business corporations. In the case of domestic corporations, the tax is for the privilege of exercising their franchises in this State in a corporate or organized capacity; in the case of foreign corporations, for the privilege of doing business in this State (§ 209). The tax is for a year in advance commencing November first of each year and is measured by the entire net income of the corporation for the preceding calendar or fiscal year, which entire net income is presumably the same as the entire net income which the corporation is required to report to the United States plus any income received as dividends on stock or any interest received on bonds of any character, and without deduction for taxes paid on either profits or

net income to the Government of the United States or for any specific deduction allowed by any other authority (§§ 209, 208).

The tax so imposed is in lieu of all taxes on personal property and on capital stock (§ 219-j).

Corporations liable to taxation under the article are required to report to the State Tax Commission on or before July first of each year, or within thirty days after the making of report of entire net income to the United States Treasury Department for any fiscal or calendar year preceding said first day of July, the information necessary to enable the Commission to compute the tax (§ 211). The Tax Commission is thereupon to audit and state the account of the corporation, to compute the tax thereon and give notice of its assessment to the corporation (§§ 219-a, 219-b). The rate is 4½ per centum of the entire net income of the corporation or portion thereof taxable within the State (§ 215).

The tax is due and payable on or before the first day of January of each year, or within thirty days after notice of the tax has been given to the corporation if given subsequent to the first day of December of the year for which the tax is imposed (§ 219-c).

If the taxpayer be dissatisfied with the audit made by the Tax Commission, it may file with the Commission at any time within one year from the time of such audit an application for revision, upon which application the Commission is required to grant a hearing, and if it shall be made to appear upon any such hearing by evidence submitted to it, or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded or that payment has been illegally made or exacted of any such account, or if it appears that the tax as originally assessed was less than should have been exacted, the Commission is required to re-settle the same according to law and the

facts by increasing or diminishing the tax or other charges, and adjust the accounts accordingly (§ 218). Provision is made for credit or refund to the corporation of the amount of any overpayment made by it (Id.).

The determination of the Commission is subject to review by certiorari to the State Supreme Court provided application therefor be made within ninety days after service of the notice of the Commission's final determination and the full amount of the taxes, percentage, interest and other charges audited and stated be deposited with the Tax Commission before making the application and an undertaking be given for the costs of the proceeding (§ 219).

For convenience a copy of this article of the Tax Law, as amended to the close of the legislative session of 1929, is annexed as an appendix to this brief (pp. 48-70).

The Facts.

The plaintiff is a corporation organized under the laws of the State of New York for the exploitation of motion picture films. On or about the 11th day of October, 1929, it filed with the State Tax Commission its annual franchise tax report under article 9-A of the Tax Law for the tax year beginning November 1, 1929, showing its operations and income for its fiscal year ended June 30, 1929 (R. fol. 10). From this report, it appeared that its gross income for that year, as reported to the United States Treasury Department, was $385,163.35; that its allowable deductions for expenses incurred in the conduct of its business aggregated $153,790.41, and that its entire net income upon which it was subject to taxation by the Federal Government was $231,372.94, being the difference between those two sums (R. fols. 28-31).

The plaintiff, in its said report to the State Tax Commission, claimed as a further deduction from its

said gross income the sum of $162,588.98, which it said consisted of royalties received by the corporation on copyrights "owned by it or its affiliated companies and granted by the United States Government" (R. fol. 33). This further deduction, if allowable, would reduce the entire net income to $68,783.96.

The plaintiff did not in its report furnish to the Tax Commission any proof or information from which the Commission could determine the amount of income which the corporation derived from copyrights owned by it, the amount of income derived from copyrights owned by its affiliated companies or the nature of the plaintiff's interest, if any, in the latter copyrights, and submitted no proof or information from which the Commission could determine the portion of the corporation's expenses properly to be allocated to its business of leasing copyrighted films or the portion thereof to be allocated to its business of leasing films which were not copyrighted.

Upon this report, the Tax Commission assessed a tax against the plaintiff in the sum of $10,411.79, being at the statutory rate of 4½ per cent upon the amount of net income so reported to the Federal Government without deduction of any amount on account of royalties alleged by the corporation to have been included therein (R. fol. 12). The income of plaintiff was not consolidated with the income of any of its subsidiary or affiliated companies shown on Schedule 23 of its report. Notice of the assessment was given to plaintiff on or about the 29th day of January, 1930, and the tax became due and payable thirty days thereafter.

In its bill of complaint the plaintiff alleged generally that it was the "owner and proprietor" of the copyrights from which $162,588.98 of its income was received (R. fols. 9, 10). From Schedule A, annexed to the complaint, it appears, however, that copyrights from which

an income of but $1,842.36 was received were issued to the plaintiff, and that the copyrights from which the balance of the income of $162,588.98 was received were issued to other corporations (R. fols. 19-27). In the affidavit of Mr. Faralla, presented by the plaintiff upon the motion for an interlocutory injunction, it is stated (R. fol. 36):

> "All of said copyrights, however, whether or not standing in the name of plaintiff corporation, are and were during the period aforesaid owned by plaintiff corporation, the latter having advanced and paid the costs of production thereof and having exclusive control and disposition thereof, and being entitled to all the income therefrom except certain agreed commissions and percentages paid in certain cases to corporations handling the production thereof upon plaintiff's order and at plaintiff's expense."

Subsequent to the commencement of the suit and to the argument of the motion for an interlocutory injunction, the plaintiff applied to the State Tax Commission for a revision of the said assessment, upon which application a hearing was held before the said Commission, at which time the Commission announced that it would affirm the assessment (R. fol. 51).

Following such hearing, the plaintiff amended its bill of complaint by adding the allegation that of the deductions on account of expenses $49,151.37 consisted of its expenses in procuring the aforesaid income of $162,588.98 from copyright royalties (R. fol. 51).

It is conceded by the appellant that the tax assessed against it was assessed in exact accordance with the statute.

Summary of Argument.

I. Article 9-A of the New York Tax Law is not unconstitutional as to the appellant because of the inclu-

sion of royalties from copyrights in the net income which furnishes the measure of the tax.

A. The States may lawfully impose an excise tax upon corporations for the privilege of exercising their corporate franchises or doing business within the State even though there be included in the measure of the value of such privilege property or income which is exempt from direct taxation.

B. The tax imposed by Article 9-A of the Tax Law is a tax upon the privilege of exercising the corporate franchises or doing corporate business within the State, and is a true excise tax. It is not a tax upon property or income, the net income of the corporation for a preceding year being used merely as the measure of the value of the future exercise of the privilege.

C. New York has not attempted under the guise of an excise tax to tax income from copyrights.

II. The appellant is not entitled to the injunctive relief asked, even though royalties from copyrights may not be included in the measure of the tax, because its tender of the tax due even on that theory was insufficient in amount.

A. The appellant, in computing the tax which it has tendered, has deducted income from copyrights which it did not own.

B. The appellant, in computing the tax which it has tendered, has deducted from its gross income not only the total amount of income from copyrights but also its expenses incurred in procurring such income.

ARGUMENT

POINT I

Article 9-A of the New York Tax Law is not unconstitutional as to the appellant because of the inclusion of royalties from copyrights in the net income which furnishes the measure of the tax.

A

The States may lawfully impose an excise tax upon corporations for the privilege of exercising their corporate franchises or doing business within the State even though there be included in the measure of the value of such privilege property or income which is exempt from direct taxation.

This well established rule has been applied by this Court in cases where the tax was measured by the value of capital stock, by the amount of dividends declared on capital stock, by the amount of deposits in bank, by the value of decedents' estates and by the net income of corporations, and has been held to apply to federal bonds, property in interstate commerce, patents and copyrights, and the income from such properties.

Flint v. *Stone Tracy Co.*, 220 U. S. 107, 162-163;
Society for Savings v. *Coite*, 6 Wall. 594;
Provident Institution for Savings v. *Massachusetts*, 6 Wall. 611;
Hamilton Co. v. *Massachusetts*, 6 Wall. 632;
Home Insurance Co. v. *New York*, 134 U. S. 594;
People ex rel. United States Aluminum Printing Plate Co. v. *Knight*, 174 N. Y. 475;
Kansas City, Fort Scott & Memphis Ry. Co. v. *Kansas*, 240 U. S. 227;
National Lecther Co. v. *Massachusetts*, 277 U. S. 413;
International Shoe Co. v. *Shartel*, 279 U. S. 429;
Hump Hairpin Co. v. *Emmerson*, 258 U. S. 290;
Underwood Typewriter Co. v. *Chamberlain*, 254 U. S. 113, 120;
United States Glue Co. v. *Oak Creek*, 247 U. S. 321, 328.

In *Flint* v. *Stone Tracy Co., supra,* a federal tax on corporations imposed "with respect to carrying on or doing business" and measured by net income, was held to be an excise, not a direct tax on property or income, and to be valid notwithstanding the fact that net income from tax-exempt municipal bonds was included in the measure of the tax. This court, after discussing the previous decisions of the court, said (p. 163):

> "There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. *The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property.*" (Italics ours.)

The opinion continues (at p. 165):

> "It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation from all sources, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed."

This case may not be distinguished from the case at bar upon the ground that the statute there involved was a federal statute, for Congress has no greater authority to burden the instrumentalities of the states or their

municipalities than the states have to burden those of the Federal Government. *Collector* v. *Day*, 11 Wall. 113, 125-128; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 583-585; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 521. Indeed, the court finds previous authority for the proposition in the cases involving state statutes hereinafter discussed and expressly states the rule as applying to the "taxing power of the State or Nation" (p. 163, quoted *supra*).

As this Court said in *Osborne* v. *Mobile*, 16 Wall. 479:

> "It is as important to leave the rightful powers of the State in respect to taxation unimpaired as to maintain the powers of the Federal Government in their integrity."

In *Society for Savings* v. *Coite*, *supra*, a franchise tax of Connecticut imposed upon savings banks for the privilege of doing business within the State, measured by a percentage upon the total amount of their deposits on a certain day, was sustained notwithstanding the fact that a considerable part of such deposits was invested in securities of the United States expressly declared by Congress to be exempt from taxation by State authority.

Provident Institution for Savings v. *Massachusetts*, *supra*, is to the same effect.

In *Hamilton Co.* v. *Massachusetts*, *supra*, a statute of Massachusetts requiring corporations having a capital stock divided into shares to pay a franchise tax of a certain percentage upon "the excess of the market value" of all such stock over the value of its real estate and machinery was similarly held to be valid though the corporation held large amounts of United States Government bonds which were elements contributing to the value of the capital stock.

In *Home Insurance Co.* v. *New York*, *supra*, a statute of New York imposed a tax upon "the corporate fran-

chise or business" of corporations doing business within the State measured by the extent of the dividends made or declared during the year. The court held that the tax was an excise or privilege tax and not violative of the provisions of a federal statute exempting bonds of the United States from taxation, although a portion of the dividends may have been derived from interest on capital invested in such bonds.

In *People ex rel. United States Aluminum Printing Plate Co.* v. *Knight*, *supra*, the State Court of Appeals had under consideration a statute (§ 182 of the present Tax Law) which, like the statute now under consideration, was "for the privilege of exercising its corporate franchises or carrying on its business in such corporate or organized capacity in this State," but which was to be computed upon the basis of the amount of its capital stock employed within the State during the year. The capital of the relator corporation was substantially all invested in Letters Patent issued by the United States. The court held that the tax imposed by the statute was not one upon property, but an excise or privilege tax, and was constitutionally unobjectionable because of the inclusion of the value of the patent rights in the measure of the tax.

In *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, *supra*, a statute of Kansas imposed a tax upon domestic corporations to be computed according to the amount of their paid-up capital stock. The corporation objected that the effect of the statute was to tax its income from interstate commerce. Mr. Justice Hughes, writing for the court, said (at p. 232):

> "Examining the statute in the present case, we see no reason to doubt the accuracy of the description of the tax by the State court. We take it to be simply a tax on the privilege of being a corporation,—on the primary corporate fran-

chise granted by the State. The authority of the State to tax this privilege, or franchise, has always been recognized and it is well settled that a tax of this sort is not necessarily rendered invalid because it is measured by capital stock which in part may represent property not subject to the State's taxing power. Thus, in *Society for Savings* v. *Coite*, 6 Wall. 594, 606, 607, the power to levy the franchise tax was deemed to be 'wholly unaffected' by the fact that the corporation had invested in Federal securities; and in *Home Ins. Co.* v. *New York*, 134 U. S. 594, 599, 600, it was held that a tax upon the privilege of being a corporation was not rendered invalid because a portion of its capital (the tax being measured by dividends) was represented by United States' bonds. These cases were cited with distinct approval, and the rule they applied in distinguishing between the subject and the measure of the tax was recognized as an established one, in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 165. It is also manifest that the State is not debarred from imposing a tax upon the granted privilege of being a corporation, because the corporation is engaged in interstate as well as intrastate commerce. *Delaware Railroad Tax*, 18 Wall. 206, 231, 232; *State Railroad Tax Cases*, 92 U. S. 575, 603; *Philadelphia & Southern S. S. Co.* v. *Pennsylvania*, *supra*; *Ashley* v. *Ryan*, 153 U. S. 436; *Cornell Steamboat Co.* v. *Sohmer*, 235 U. S. 549, 559, 560. And, agreeable to the principle above mentioned, it has never been, and cannot be, maintained that an annual tax upon this privilege is in itself, and in all cases, repugnant to the Federal power merely because it is measured by authorized or paid-up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority. We have recently had occasion (*Baltic Mining Co.* v. *Massachusetts*, *supra*), to emphasize the necessary caution that 'every case in-

> volving the validity of a tax must be decided upon its own facts'; and if the tax purports to be laid upon a subject within the taxing power of the State, it is not to be condemned by the application of any artificial rule but only where the conclusion is required that its necessary operation and effect is to make it a prohibited exaction."

An attempt has been made to distinguish these latter cases upon the ground that the impact is more direct in the case of a tax measured by net income than of a tax measured by capital stock, by dividends on capital stock or by deposits. It is unquestionable, however, that the measurement of an excise by the value of the corporation's capital stock including the *value* of tax-exempt assets much more closely touches those assets than a measurement of such an excise by the entire *net* income of the corporation. In the one case, the value of the assets themselves is included in the measure; in the other the annual income from such assets is merely included in the gross income from which, after deduction of all the expenses of the corporation, the net income measure is obtained. The value of the capital stock which furnishes the measure consists of the value of the corporate assets less liabilities. If the assets consist in whole or in part of tax-exempt properties, those properties are used *pro tanto* to measure the tax. In such case the impact is much more direct than in the case of a net income measurement. We are referring more particularly to those taxes which are measured by the *actual value* of the capital stock, as determined by the market, by a reference to assets and liabilities or to the rate of dividends paid, such as the tax imposed by § 182 of the New York Tax Law. That was the nature of the capital stock taxes discussed in two of these cases. In a few instances, statutes measure the privilege by the *par value* of the stock. Such an instance is the minimum tax provision of § 214, subd.

10 of our Tax Law. Even then, the capital stock represents, of course, the assets of the corporation and reflects, though perhaps less closely, investments in tax-exempt securities or property. (See *Kansas City, etc.* v. *Kansas, supra*).

In the case of bank deposits, the measurement is by a part of the assets of the bank—the amount of money on deposit on a given day—and where a part of such assets is invested in tax-exempt securities, the measure includes the value of such securities. It is not true that the measure is the debts of the bank to its depositors, although, of course, the relationship of debtor and creditor exists. The measure consists of the assets (money) which the bank acquired and which furnished the consideration for the debts. (See *Society for Savings* v. *Coite, supra*, at p. 609.)

International Shoe Co. v. *Shartel, supra, Hump Hairpin Co.* v. *Emmerson, supra, Underwood Typewriter Co.* v. *Chamberlain, supra, United States Glue Co.* v. *Oak Creek, supra*, and *National Leather Co.* v. *Massachusetts, supra*, further establish the principle that an excise on a corporation may be measured by its outstanding capital stock or by its net income even though a part of its capital is used in, or some of its income is derived from, interstate commerce or business without the State.

Similarly a State inheritance tax may be measured by including the value of United States bonds held by the decedent.

> *Plummer* v. *Coler*, 178 U. S. 115.
> *Blodgett v. Silberman*, 277 U. S. 1, 12.
> *Greiner* v. *Lewellyn*, 258 U. S. 384.

The net income of corporations from transactions in interstate commerce may also be directly taxed, in a manner not unreasonably to interfere with such com-

merce, under a general income tax law. *United States Glue Co.* v. *Oak Creek, supra.* This Court held in *Long* v. *Rockwood*, 277 U. S. 142, that income from patents could not be directly taxed by the states, a majority of the Court being of the opinion that such income was more analogous to income from federal bonds than to income from interstate commerce. The question is irrelevant to the present discussion, however, for the tax here involved is an excise and not a tax on the income.

The appellant relies upon several cases which it interprets as establishing principles at odds with the rulings of this Court in the cases which we have cited, viz.:

Gillespie v. *Oklahoma*, 257 U. S. 501;
Clallam County v. *United States*, 263 U. S. 341;
Jaybird Mining Co. v. *Weir*, 271 U. S. 609;
Northwestern Mutual Life Ins. Co. v. *Wisconsin*, 275 U. S. 136;
Miller v. *Milwaukee*, 272 U. S. 713;
Panhandle Oil Co. v. *Mississippi*, 277 U. S. 218;
Long v. *Rockwood*, 277 U. S. 142;
National Ins. Co. v. *United States*, 277 U. S. 508;
State ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313.

None of these cases detracts in the slightest degree from the authority of the decisions which we have cited.

The tax under consideration in *Gillespie* v. *Oklahoma, supra*, was a *direct* tax upon personal income. The court held that net income from a federal instrumentality—in that case oil leases of Indian lands—could not be taxed. No question of the measurement of an *excise* by net income was involved.

Clallam County v. *United States, supra*, involved a *direct* tax on property of a corporate agent of the United States created for the purpose of providing weapons for the war.

Jaybird Mining Co. v. *Weir, supra*, involved a *direct ad valorem* property tax on ores.

In *Northwestern Mutual Life Ins. Co.* v. *Wisconsin, supra*, a case involving the question of immunity of interest on federal bonds, the tax was based not on *net* income but on *gross* income. The court, expressly distinguishing its former decisions, notably *Flint* v. *Stone Tracy Co., supra*, upon that ground, said (p. 140):

> "The fundamental question, often presented in cases similar to these, is whether by the true construction of the statute the assessment must be regarded as a tax upon property or one on privileges or franchise of the corporation. *Society for Savings* v. *Coite*, 6 Wall. 594; *Home Insurance Co.* v. *New York*, 134 U. S. 594.
>
> "Section 76.34 undertakes to impose a charge not measured by dividends paid, as in *Home Insurance Co.* v. *New York*, 134 U. S. 594, nor by *net income*, as in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; and those cases are not controlling. The distinction between an imposition the amount of which depends upon dividends or *net receipts* and one measured by *gross returns* is clear. *U. S. Glue Co.* v. *Town of Oak Creek*, 247 U. S. 321, 328, and earlier opinions there cited." (Italics ours.)

The distinction is clearly stated in *U. S. Glue Co.* v. *Oak Creek, supra*, in the following language (pp. 328, 329):

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference

> between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

In *Miller* v. *Milwaukee*, *supra*, the statute under consideration was the *direct* personal income tax law of Wisconsin, the question presented being whether a provision of that law taxing only so much of corporate dividends received by a stockholder as corresponded to corporate income not taxable to the corporation was a valid provision.

The statute involved in *Panhandle Oil Co.* v. *Mississippi*, *supra*, was one imposing a tax on dealers in gasoline for the privilege of selling that product, measured by the *number of gallons sold*. As to gasoline purchased by the United States from such a dealer, the effect of the statute was, of course, to increase the cost of the gasoline to the Federal Government by the amount of the tax imposed upon the sale. This, the court said, was "to tax the United States—to exact tribute on its transactions and apply the same to the support of the State" (p. 222).

The tax involved in *Long* v. *Rockwood*, *supra*, was a *direct* tax on personal income.

National Life Ins. Co. v. *United States*, *supra*, involved a *direct* federal tax on *gross* income.

The statute involved in *State ex rel. Missouri Ins. Co.* v. *Gehner*, *supra*, imposed a *direct* property tax.

Not one of these cases has any bearing on the question of the measurement of a corporate franchise tax by net income.

It is, we submit, definitely settled law that the states may impose a franchise tax on corporations measured

by *net* income even though there be included in the *gross* income from which the figure of net income is obtained income which is itself exempt from taxation.

B

The tax imposed by article 9-A of the Tax Law is a tax upon the privilege of exercising the corporate franchises or doing corporate business within the State, and is a true excise tax. It is not a tax upon property or income, the net income of the corporation for the preceding year being used merely as the measure of the value of the future exercise of the privilege.

There can be no doubt that New York *intended* by Article 9-A of its Tax Law to impose an excise or privilege tax. It has entitled the article "Franchise Tax on Business Corporations," and it has enacted that every corporation not exempted by the article shall pay in advance "an annual franchise tax" which, in the case of domestic corporations, is "for the *privilege* of exercising its franchise in this State in a corporate or organized capacity." The *net* income of the corporation for the *preceding* calendar or fiscal year is used, but merely as the measure of the value of the privilege. The tax is in lieu of all taxes on personal property and on capital stock.

That the tax so imposed is *in fact* an excise or privilege tax has been definitely settled by the decisions in the following cases:

People ex rel. Bass, Ratcliff & Gretton, Ltd. v. *State Tax Commission*, 232 N. Y. 42, affd. 266 U. S. 271;

New York v. *Jersawit*, 263 U. S. 493, 496;

Home Insurance Co. v. *New York*, 132 U. S. 594, *supra;*

People ex rel. United States Aluminum Printing Plate Co. v. *Knight*, 174 N. Y. 476, *supra;*

New York v. *Latrobe*, 279 U. S. 421;

Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203;

Society for Savings v. *Coite*, 6 Wall. 594, *supra;*
Provident Institution for Savings v. *Massachusetts*, 6 Wall. 611, *supra;*
Hamilton Co. v. *Massachusetts*, 6 Wall. 632, *supra;*
Kansas City, Fort Scott & Memphis Ry. Co. v. *Kansas*, 240 U. S. 227, *supra;*
Anderson v. *Forty-two Broadway Co.*, 239 U. S. 69;
Roberts & Schaefer Co. v. *Emmerson*, 271 U. S. 50.

Construing this *identical statute* in a case involving the constitutionality of the operation of a segregation of assets formula provided by the statute for the apportionment of income to sources within and without the State, as applied to a corporation which derived no net income from the local business, this Court in the *Bass, Ratcliff & Gretton* case, said (at pp. 280, 284):

> "We see no reason to doubt the accuracy of the statement made by the Court of Appeals in the present case that the franchise tax imposed by the statute is 'primarily a tax levied for the privilege of doing business in the State.' *It is not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from the business in the preceding year. See New York* v. *Jersawit*, 263 U. S. 493, 496. * * *
>
> "Furthermore, the statutory method of apportionment not being shown to be arbitrary or unreasonable, we think that the Court of Appeals rightly held that the tax imposed for the carrying on of the business in New York is not invalid merely because in the preceding year the business conducted in New York may have yielded no net income. There is no sufficient reason why a foreign corporation desiring to continue the carrying on of business in the State for another year—from which it expects to derive a benefit—should be

> relieved of a *privilege tax* because it did not happen to have made any profit during the preceding year." (Italics ours.)

In *New York* v. *Jersawit*, *supra*, the question was before this Court whether the tax imposed by this statute could in case of bankruptcy, be apportioned to a fraction of the tax year which has elapsed when the corporation goes out of business. The court held that it could not be apportioned because it was a tax for a future privilege, saying (p. 496):

> "*We are of the opinion that the tax is a tax upon the right conferred.*"

In *Home Insurance Co.* v. *New York*, *supra*, this Court had under consideration a New York statute (L. 1881, ch. 361) which was the predecessor of the present Article 9-A. That statute imposed a tax upon "the corporate franchise or business" of corporations doing business within the State, measured by the dividends declared on the capital stock. On the question of the nature of the tax, the court said (p. 606):

> "In this case we hold, as well upon general principles as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought is *not a tax on the capital stock or property of the company, but upon its corporate franchise*, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United State." (Italics ours.)

We have discussed the decision in *People ex rel. United States Aluminum Printing Plate Co.* v. *Knight*, *supra*, in a former Point. In its opinion in that case the Court of Appeals said (p. 478):

> "Finally, there is a franchise tax on corporations which is payable annually to the state, 'com-

> puted upon the basis of the amount of its capital stock employed within this state.' (Id. § 182.) *This is not a tax upon property*, although it is measured by the value of property, but upon the right of a corporation to exist and exercise the powers granted by its charter."

Section 181 of the New York Tax Law imposes a license tax on every foreign corporation doing business in the State, measured by the amount of its capital stock employed in the State during the first year of carrying on business here, which, like the tax under review, is "for the privilege of exercising its corporate franchise or carrying on its business in such corporate or organized capacity in this State." In the case of stock without par value, the tax is computed at a flat rate per share. In the recent case of *New York* v. *Latrobe*, *supra*, this Court treated the statute as one imposing an excise or franchise tax and upheld it as such, as against the claim that it had the effect of unconstitutionally taxing property without the State and was in violation of the equal protection clause of the Fourteenth Amendment. The court said (pp. 426-428):

> "The kind and number of shares with which a foreign corporation is permitted to carry on its business within the state is a part of the *privilege* which the state extends to it and is a proper element to be taken into account in fixing a *tax on the privilege*. * * *
>
> Although permissible, a *franchise tax need not* be based solely on the amount of business done or property owned within the state. It may be rested on the nature of the business (*Southwestern Oil Company* v. *Texas*, *supra*; *Quong Wing* v. *Kirkendall*, 223 U. S. 59; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Williams* v. *Fears*, 179 U. S. 270, 275; see *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 562), or the particular form in which it is carried on (see *Home*

Insurance Co. v. *New York*, 134 U. S. 594, 606), so long as it bears some real and reasonable relation to the privilege granted or to the protection of the interests of the state. See *Roberts & Schaefer Co.* v. *Emmerson, supra*, at p. 57.

"We think that the *measurement* of such a tax upon a foreign corporation at a flat rate upon its corporate stock, either par or non-par, used within the state, is likewise reasonably related to the *privilege granted by the state* and to the protection of its own interest in the maintenance of its similar policy of taxation with respect to domestic corporations and so does not infringe any constitutional immunity." (Italics ours.)

Cases construing similar statutes of other states are numerous. We have cited a few of them. In *Alpha Portland Cement Co.* v. *Massachusetts, supra*, the court said of a Massachusetts statute which measured a privilege tax by net income of the year for which the tax was imposed (p. 216):

"Counsel for the Commonwealth assert: 'The present tax law imposes an excise on foreign corporations for the privilege of doing business in Massachusetts under the protection of its laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done within the State. Payment of the tax is not made a condition precedent to the doing of business. Collection of the tax is to be made by ordinary methods. There is no discrimination either against foreign corporations or against interstate commerce.' 'The taxes complained of were excises and not property taxes.' 'Being excises these taxes are not taxes *on* property or net income, but taxes *measured by* property and net income, used in or derived from business done in Massachusetts.' See *Judson Freight Forwarding Co.* v. *Commonwealth*, 242 Mass. 47.

"This view of the nature of the exaction was adopted by the court below, and we think it is the

> correct one. *The right to lay taxes on tangible property or on income is not involved;*" (Italics ours.)

The fact that income from interstate commerce was there involved instead of income from federal, state and municipal bonds, as in the *Macallen* case, is unimportant on the question of the *nature* of the tax, for, as we have seen, either may be included in the measure. In the *Macallen* case, the statute was held unconstitutional as to the bond income not because such income might not be included, but because Massachusetts, *under the guise of a privilege tax, had deliberately set out to include it.* This aspect of the matter will be discussed in a subsequent point.

Of the federal statute of 1909, under consideration in *Flint* v. *Stone Tracy Co., supra,* this Court said in *Anderson* v. *Forty-two Broadway Co., supra,* (p. 72):

> "As has been repeatedly pointed out by this Court in previous cases (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 145, 150, 15; *McCoach* v. *Minehill Railway*, 228 U. S. 295, 306 *et seq.; United States* v. *Whitridge*, 231 U. S. 144, 147; *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414), the act of 1909 was not in any proper sense an income tax law, nor intended as such, but was an excise upon the conduct of business in a corporate capacity, the tax being measured by reference to the income in a manner prescribed by the act itself."

This brings us to a discussion of *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, in which the Court of Appeals said that in substance though not in form the tax imposed by this article of the Tax Law was the same as if imposed directly upon income. The question there was not whether the State might constitutionally include interest from federal bonds in the measure, as the appellant infers, but

whether the effect of the statute was not to tax income earned without the State. Under the statute, interest on bonds *of any kind* was to be included in the net income furnishing the measure of the tax, but the bonds themselves were not to be included in the segregation of assets by which the income was to be allocated to sources within and without the State. The relator corporation, which owned bonds, presumably of railroads and of foreign countries (see opinion, p. 52), attacked the allocation formula as inequitable in that its effect was to measure the tax by income from its extra-state business. The court, upholding the corporation's contention in that respect, held that the remedy was to subtract the interest on the bonds rather than to add the value of the bonds to the segregation formula. The case involved no question whatever of the immunity from taxation of federal bonds or any other specie of property.

A year after this decision, the *same* court had before it *People ex rel. Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission, supra*, where was involved the constitutionality of the operation of the *same* segregation formula. Sustaining the constitutionality of the statute, the court said of its former decision (p. 46):

> "The tax is denominated a franchise tax and although we have said in another connection (*People ex rel. Alpha P. C. Co.* v. *Knapp, supra*, p. 57) that 'the tax imposed upon this franchise must be held in practical operation to be a tax upon the income * * *. This tax is equivalent to a tax upon relator's income,' *it is primarily a tax levied for the privilege of doing business in the state.*" (Italics ours.)

This decision was affirmed by this Court in an opinion from which we have already quoted (p. 19, ***supra***).

If the language of the court in *Alpha Portland Cement Co.* v. *Knapp*, *supra*, is to be construed as holding that the tax imposed by the statute under consideration is a direct tax on property or income, it has been definitely overruled by its own later decision and by the decision of this Court in the *Bass, Ratcliff & Gretton* case, where it was expressly held to be "not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allocated income accruing from the business in the preceding year."

The appellant cites (Brief, p. 19) *De La Vergne M. Co.* v. *State Tax Commission* 211 App. Div. 227, aff'd 241 N. Y. 517, decided after the decision of this Court in the *Bass, Ratcliff & Gretton* case. The Court of Appeals wrote no opinion in the case. The Appellate Division, far from saying that the tax in practical operation was a tax on income, cited the opinion of this Court in *New York* v. *Jersawit*, *supra*, to the contrary, saying (pp. 230, 231):

> "During the year 1918 the United States was the exclusive owner of the stock of the corporation and was likewise, through the Cramp Company, the exclusive manager of its affairs. It was the net income received by the corporation during that year which was made the basis of the tax. Therefore, *if we regard* the tax as being essentially a tax upon net income it was a tax upon income accruing to the United States and consequently invalid as a tax upon Federal property. The same result follows *if we regard* it as a tax upon the privilege of doing business or exercising a franchise. The taxable status of the De La Vergne Company for the year November 1, 1919, to October 31, 1920, was determinable on November 1, 1919. (*State of N. Y.* v. *Jersawit*, 263 U. S. 493.) In the case cited Mr. Justice Holmes said: 'We are of opinion that the tax is a tax upon the right conferred, not upon the exercise of it'." (Italics ours.)

Mention has been made of three or four instances where in the administrative provisions of Article 9-A the tax imposed by § 209 has been referred to as a tax "on" or "upon" net income. These references without exception came into the statute by amendment after its original enactment. It is obvious that they were the result of certain looseness and inaccuracy on the part of the draftsman. It will be noted that throughout the article the usual expression is "upon the basis of" net income (§§ 209; 214, subd. 7; 214, subd. 10), or "based on" net income (§§ 211, subd. 1; 214, 1st par.; 214, subd. 10; 219-d), or, as in two instances, net income used or included in "measuring a franchise tax" (§§ 212; 214, subd. 8).

The inaccuracy of expression in these amendments does not impress us as having any considerable weight on the question of the nature of the tax. Indeed, this Court, in *Roberts & Schaefer Co.* v. *Emmerson, supra*, held a statute of Illinois to impose an excise tax even though the section imposing it read that the tax, denominated a license fee or franchise tax, was "on" each one hundred dollars of a proportion of the capital stock. The statute provided (p. 52 of 271 U. S.):

> "Each corporation for profit * * * organized under the laws of this State, or admitted to do business in this State, and required by this Act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents *on* each one hundred dollars of the proportion of its capital stock, authorized by its charter in the office of the Secretary of State, represented by business transacted and property located in this State." (Italics ours.)

On the question of the nature of the tax, this Court said (pp. 55, 56):

> "The tax is not a property tax imposed on shares of stock or on the assets of the corporation.

> It is a tax on the corporate franchise, which includes the privilege, whether exercised or not, of issuing and using when issued, a particular kind of stock known as 'no-par value stock'."

The tax is, of course, no less an excise because imposed upon the *privilege* of exercising the corporate franchise, instead of upon the *exercise* of the privilege, as in *Flint* v. *Stone Tracy Co., supra*, and *Macallen Co.* v. *Massachusetts, supra*. Appellant's rather elaborate argument to the contrary, which we confess our inability to follow completely, entirely overlooks the fact that the taxes which this Court had under consideration in *People ex rel. Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission, supra*, *New York* v. *Jersawit, supra*, *New York* v. *Latrobe, supra*, *Roberts & Schaefer Co.* v. *Emmerson, supra*, and *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas, supra*, were taxes upon a privilege granted, not upon the exercise of the privilege. As a matter of fact, most excises are of that nature.

As we read the appellant's brief, its position is that the tax is neither a tax on property nor an excise, but is something in between which it describes as "an indirect tax on income." We think that, as it is not a tax on property, it is an excise and that to call it an indirect tax on income is but another way of saying that it is an excise. As Mr. Chief Justice Fuller said in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 557:

> "And although there have been from time to time intimations that there might be some tax which was not a direct tax nor included under the words 'duties, imposts and excises,' such a tax for more than one hundred years of national existence has as yet remained undiscovered, notwithstanding the stress of particular circumstances has invited thorough investigation into sources of revenue."

We do not, of course, dispute the proposition that a tax which is in form a tax upon a privilege may in certain cases and to a limited extent be held to lay a direct tax upon property. Such was the decision of this Court in *Northwestern Insurance Co.* v. *Wisconsin*, *supra*, where the tax was measured by *gross* income. It carefully distinguished, however, cases where *net* income furnished the measure. The Court also so held in the *Macallen* case, where net income was used as the measure, but only because Massachusetts had deliberately set out to reach the tax-exempt income. This Court, in *Flint v. Stone Tracy Co.*, *supra*, expressly held that net income might be used as the measure even though it included income from tax-exempts. We know of no case which even intimates that this may not be done where the inclusion, as here, is incidental merely and not the result of an attempt to reach that which the State is without power to tax.

It is interesting to note that the appellant's argument on this point constitutes a complete reversal of its original position, for in its bill of complaint and in its assignment of errors it has repeatedly described the tax as a franchise tax measured by net income (R. fols. 11, 12, 65, 66).

It is submitted that the court below was entirely correct when it said (R. fol. 59):

> "It cannot be doubted that this tax is not directly on income but is purely an excise."

C

New York has not attempted under the guise of an excise tax to tax income from copyrights.

The effect of the decisions which we have cited and which seem to be conclusive upon the point at issue is in no way impaired by the recent decision of this Court

in *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, much relied upon by the appellant. As appears from this Court's opinion in that case, the State of Massachusetts has a statute imposing a tax, denominated an excise tax, upon corporations, measured in part by the value of the "corporate excess" and in part by the net income of the corporation. Prior to 1925, the statute *expressly excluded* from the net income which was to measure the tax all interest received upon bonds, notes and certificates of indebtedness of the United States, and the definition contained in the statute had the effect also of excluding from such measure interest on state, county and municipal bonds. In 1925, the Legislature amended the statutory definition of net income for the *very purpose*, as the court found, of *including* the income from these tax exempt securities which had theretofore been expressly excluded. This Court held that the *real purpose* of the amendment was to tax the exempt income rather than to lay a legitimate tax upon the franchises of the corporation, and that for that reason the act was unconstitutional as to such income. Mr. Justice Sutherland was careful throughout his opinion to make this meaning clear. We quote from pages 629, 630:

> "In the consideration of such legislation, the controlling principle, constantly to be borne in mind, is that the state cannot tax the instrumentalities or bonds of the United States, or, what is the same thing, the income derived therefrom, directly or indirectly—that is to say, it cannot tax *them* in any form. Words which, literally considered, import a tax upon something else,—a tax, for example, as here, upon the privilege of doing business measured in part by the amount of non-taxable interest received—may, nevertheless, be adjudged to lay a tax upon the interest, *if that purpose be fairly inferable from a consideration*

> *of the history, the surrounding circumstances, or the statute itself considered in all its parts.* See *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, 510, 521." (Italics ours.)

Quoting from the opinion of the court in *Miller* v. *Milwaukee*, 272 U. S. 713, 715, the opinion continues:

> "It is a familiar principle that conduct which in usual situations the law protects may become unlawful when part of *a scheme to reach a prohibited result.* If the *avowed purpose or self-evident operation of a statute* is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good. * * * A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed *with a different intent and not aimed at them*, but it becomes a more serious attack upon their immunity when they are its *obvious aim.*" (Italics ours.)

Further on in the opinion Mr. Justice Sutherland said (pp. 631, 632):

> "In the present case, it appears that the original statute exempted from consideration as a part of the measure of the tax all interest upon the non-taxable securities. The amended act now in force has the effect of repealing this original provision and imposing a burden upon the securities from which, by express language, they had theretofore been free. This was a distinct change of policy on the part of the Commonwealth, adopted, as though it had been so declared in precise words, *for the very purpose* of subjecting these securities *pro tanto* to the burden of the tax. (Italics ours.)

The opinion gives no intimation that the previous decisions of this Court which we have cited above are

to be deemed overruled or even modified. Rather does the Court cite those decisions with approval and distinguish them upon the ground that the statutes involved in them imposed a legitimate tax upon the privilege and no attempt had been made to reach the non-taxable subject (p. 628):

> "The court below predicates its decision upon a series of decisions of which *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 163-165, is the extreme example, holding that a tax lawfully imposed upon the exercise of corporate privileges within the taxing power may be measured by income from the property of the corporation although a part of such income is derived from non-taxable property. See also *Home Ins. Co.* v. *New York*, 134 U. S. 594; *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611. The *distinction* pointed out in these cases is between an *attempt to tax* the property or income as such and *to measure* a legitimate tax upon the privileges involved in the use thereof. It is implicit in all that the thing taxed in form was in fact and reality the subject *aimed at*, and that any burden put upon the non-taxable subject by its use as a measure of value was *fortuitous and incidental.*"

In the instant case, not only has the statute been heretofore authoritatively construed as imposing a true excise tax, but there can be no suspicion that there has been any attempt by our Legislature to reach or tax the exempt income from copyrights. The tax, which is for the privilege of exercising the corporate franchise, is measured by entire net income, which, as the statute provides, is "presumably the same as the entire net income which such corporation is required to report to the United States" with certain additions not material to the present discussion. Income from copyrights is included in the federal definition of gross income and

is not deductible in determining federal net income. It follows as a matter of course that such income is included in the entire net income which furnishes the measure of the State tax. Such inclusion results from the State's adoption of the federal definitions and figures and is purely incidental and fortuitous. Copyrights are not *mentioned* in our statute. No amendment of the act has been made having the purpose of reaching royalties or income therefrom. From the first enactment of the statute, such royalties have been included in the measure of the tax because they were included in the measure of the federal tax.

It is further to be noted that our statute, unlike the Massachusetts statute construed in the *Macallen* case, measures the tax, not by the income of the year for which the tax is imposed, but by the income of a year ending in most cases ten months before the tax year and in the instant case, because the corporation reports on a fiscal year basis, four months before the tax year. This furnishes an additional distinction from the *Macallen* case and a strong additional reason why the tax may not be regarded as a tax upon property.

The argument has been made that because income from copyrights is included in the measure of the tax, the Legislature must have attempted to include it. The fact is, however, that assessments under our statute do not include income from tax-exempt sources in one case out of a thousand, for few business corporations hold securities or property which are exempt from taxation. If the fact that tax-exempt income is included in a particular case is sufficient evidence of an improper legislative purpose to include it, the distinction between the taxation of exempt property or net income therefrom and the measurement of a franchise tax by such property or income which this Court has been careful to preserve in such cases as *Flint* v. *Stone Tracy Co.*,

Miller v. *Milwaukee*, *Kansas City Ry. Co.* v. *Kansas*, *Northwestern Mutual Life Insurance Co.* v. *Wisconsin* and the *Macallen* case, is entirely without reason. The statute involved in *Flint* v. *Stone Tracy Co.* measured the tax by "entire net income," exactly as our statute measures it. The Court, although discussing the point (see pp. 162-165), found no difficulty in holding that there had been no unlawful attempt to tax the exempt income. That case and the present one may not be distinguished in the slightest particular.

Appellant has quoted from a brief filed by the State Tax Commission, *amicus curiae*, in the *Macallen* case, to the effect that the taxing systems of New York and Massachusetts are so nearly identical in the particulars affected by that suit that whatever decision should be reached by the court would doubtless apply with like force to the State of New York. This brief was not filed by the Attorney General but by other counsel. The statement quoted indicates merely that such counsel were unaware of the deliberate attempt of Massachusetts to reach the non-taxable income or that they failed to sense the importance of that fact. We think that we have established that there is a real and vital distinction between the *deliberate attempt* of Massachusetts to reach tax-exempt income from government bonds and the *incidental and fortuitous* inclusion of income from copyrights in the measure of the New York tax.

In a brief submitted, *amicus curiae*, on the application for a rehearing in the *Macallen* case, we expressed doubt that this Court intended to limit its decision to cases where the State Legislature had deliberately set out to reach non-taxable income, for the reason that under it, as so interpreted, there would exist a situation where certain states would be lawfully including income from tax-exempt securities in the measure of the tax while those states which had offended by specifically

including such income would never thereafter be able to include it. The doubt which we entertained upon that subject was quite effectually removed by the court's denial of the petition for rehearing. Moreover, the *Macallen* case involved the question of exemption of interest on federal, state and municipal bonds, rather than income from copyrights, which, as we have seen, has had quite a different history both in New York and Massachusetts. No state, so far as we know, has a statute expressly including in the measure of a franchise tax income from copyrights.

The Amendments of the New York Statute

The appellant refers to an amendment of § 208, subd. 3, of the Tax Law made by L. 1924, ch. 329, which added to the definition of net income, income from federal, state and municipal bonds, and to an amendment of § 209 of the Tax Law made by L. 1927, ch. 479, which added the following sentence:

> "However, in determining the entire net income, for purposes of equitable taxation under this article of the tax law, the tax commission may include income from any source, provided only that the assets from which the income arose shall be included in any segregation for the purpose of computing the tax."

It is freely admitted that the purpose of the first of these amendments was to include income from those tax-exempt securities which the Court of Appeals in the *Standard Oil* case (237 N. Y. 142) had held not to be included in the federal definition of gross income, then in use by the State. The Court of Appeals did not indicate any doubt that such income might lawfully be included, in fact it expressly held that income from United States bonds was to be included to the extent that it fell within the federal definition of gross income.

and the Legislature was justified in believing that it had the right to include it. In view of the fact that the income used as the measure of the tax is the income of a previous year—not the income of the year for which the tax is imposed, as in the *Macallen* case—we think that the Court of Appeals and the Legislature were right. It is difficult to see how a privilege tax for one year may be said to be a *direct* tax on income received in a preceding year. But, however that may be, the questions involved in the present case are in no way affected by the constitutional validity or invalidity of that amendment. If the amendment is invalid, it is to be exscinded and is no part of the law. The exscission in no way affects the law as originally enacted. And it is under the law as originally enacted, when the State depended solely upon the federal statute for its definitions of both gross and net income, rather than under the amendment, that the tax in the instant case was assessed. Income from copyrights was included by the Tax Commission in computing it because such income was included in federal gross income and not deductible in determining federal net income. This was done under the *original* statute and was in no way affected by any amendment of the statute, constitutional or otherwise.

The second amendment was designed, of course, to permit of the inclusion of income from securities which the Court of Appeals had held in *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, *supra*, could not be included without also including the securities themselves in the segregation of assets used for the purpose of allocating income to sources within and without the State. It has no relevancy on the present question.

As we have already pointed out, neither patents nor copyrights are mentioned in our statute. Neither are they mentioned in, or affected by, any amendment of

the statute, and the discussion of the amendments which has come into the case is entirely extraneous and foreign to the point.

We are unwilling to allow to go unanswered the appellant's intimation that the purpose of the State in imposing an excise rather than a direct property tax may have been to include otherwise exempt income in the measure of the tax. Corporations have been taxed by this State upon their corporate franchises for over fifty years. See *Home Insurance Co.* v. *New York*, *supra*. The purpose is, of course, to tax that intangible right which is possessed by corporations and not by individuals, so well described by Mr. Justice Day in *Flint* v. *Stone Tracy Co.*, *supra* (pp. 161, 162):

> "In the case at bar we have already discussed the limitations which the Constitution imposes upon the right to levy excise taxes, and it could not be said, even if the principles of the Fourteenth Amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the

> same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods, which may be the same, whether done by corporations or individuals."

We submit that the court below was quite right when it said (R. fol. 60):

> "It is urged that the same situation is presented here as was in the *Macallen* case but we think not. * * * We think it now beside the point that the New York law as amended may, in so far as interest on federal bonds is concerned, be the result of motives not unlike those responsible for the Massachusetts law held invalid in the *Macallen* case. That question is not before us. Copyright income was not excluded from gross income in the exception in the federal law referred to in *People ex rel. Standard Oil Company* v. *Law et al., supra.* Now, as before, it enters into the measure of the franchise tax purely as a casual incident of that tax."

Decisions Since the Macallen Case

Appellant has cited two decisions by State courts and one by the California State Board of Equalization which have been handed down since this Court's decision in the *Macallen* case, viz.:

> *Aberdeen Savings Assn.* v. *Chase*, 57 Wash. 225; 289 Pac. 536;
> *Quicksafe Mfg. Corp.* v. *Graham*, 161 Tenn. 46, 29 S. W. 253;
> *Matter of Vortox Mfg. Co.*, U. S. Daily, Aug. 13, 1930, p. 1853.

In the first of these cases, it appeared that the State of Washington statute under consideration imposed upon banks and financial corporations a tax measured

by net income, and that by the *express terms* of the statute "all interest received from Federal, State, municipal or other bonds" was to be included (p. 538 of Pacific Rep.). The inclusion of such income from exempt securities was neither incidental or fortuitous, and the court, three judges dissenting, was of the opinion that it brought the case within the decision of this Court in the *Macallen* case.

In *Quicksafe Mfg. Corp.* v. *Graham*, *supra*, the court based its decision upon *Gillespie* v. *Oklahoma*, *supra*, and *Long* v. *Rockwood*, *supra*, both cases involving the direct taxation of income, and seems to have entirely overlooked the fact that the tax which it was considering was not a tax upon income at all but one upon the corporate franchise, a distinction which is of controlling importance. No mention whatever was made in the opinion of such cases as *Flint* v. *Stone Tracy Co.*, *Home Ins. Co.* v. *New York*, *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, or of the *Macallen* case.

In *Matter of Vortex Mfg. Co.*, *supra*, the Board of Equalization, although expressing some doubt of the constitutionality of the California statute, sustained the action of the franchise tax commissioner in overruling the protest of the corporation.

The appellant and all other corporations holding assets immune from direct taxation have from the first enactment of our statute paid without question or protest a tax measured in part by the income from such assets. It was not until the *Macallen* case, which the appellant construes as so revolutionary as to overrule all of the court's previous decisions upon the subject, that the claim was advanced that exempt income could not be included in the measure. That the *Macallen* case contains no such startling doctrine is shown by the statement of Mr. Justice Sutherland (p. 634) that taxes

such as the one there involved *uniformly for a century* had been condemned by the court as unconstitutional.

The learned Court below expressed the thought better than we can when it said (R. fol. 59):

> "Were it not for *Macallen v. Massachusetts*, 279 U. S. 620, we should have no hesitation in reaching the conclusion that in imposing this tax a constitutionally permissible method of measurement has been used. And that decision, though much relied upon by the plaintiff, does not seem to change the general principle developed in the decisions above referred to but tends to mark the limits of what is mere casual effect upon tax exempt property which will be tolerated in recognizing and trying to overcome the practical difficulties confronting two governments, State and Nation, in raising revenue within the same geographical area."

POINT II

The appellant is not entitled to the injunctive relief asked, even though royalties from copyrights may not be included in the measure of the tax, because its tender of the tax due even on that theory was insufficient in amount.

A

The appellant, in computing the tax which it has tendered, has deducted income from copyrights which it did not own.

We think that it is conceded that, if royalties from copyrights may not be included in the measure of the tax, no one except the owner of the copyrights is entitled to claim the exemption.

In the instant case, it does not appear that the appellant was the owner of the copyrights from which more than an inconsiderable part of its claimed exempt income was derived. The original allegation, which was contained in the appellant's report to the State Tax

Commission and was incorporated in the bill of complaint by reference, was that the copyrights were owned "by it *and its affiliated companies.*" From its bill of complaint and supporting affidavit it further appears that the bulk of the copyrights were issued to and stand in the name of other companies.

Notwithstanding these admissions, it is claimed that, by virtue of some arrangement with these other companies by which the appellant paid the cost of production and under which these companies received certain remuneration, the appellant became the owner. But these other companies must have been the owners at the time they obtained the copyrights. At what time, then, did title pass to the appellant?

The statute provides that a copyright may be assigned, granted or mortgaged by an instrument in writing signed by the proprietor of the copyright (Mar. 4, 1909, C. 320, § 42, 35 Stat. 1084).

In *Public Ledger Co.* v. *Post Printing and Publishing Co.*, 294 Fed. 430, 433, the Circuit Court of Appeals said:

> "It seems to be conceded and is undoubtedly true that a written assignment is necessary to transfer the proprietorship of a literary work or the copyright of it, after the copyright has been secured."

There has been no assignment in writing of these copyrights to the appellant and there is no proof that anything has occurred since the copyrights were obtained which would have the effect of transferring even the equitable ownership of them.

Upon the facts presented, it would appear that the remuneration which the other companies received, rather than the profits of the appellant from exploiting the copyrights of others, was the income which was exempt from taxation.

We think that the burden rests upon a corporation which seeks to enjoin public officers from performing duties placed upon them by statute to clearly allege and prove the facts which entitle it to such equitable relief, and we submit that the plaintiff's allegations on the subject of ownership, which to say the least are equivocal, are entirely insufficient to discharge such burden.

B

The appellant, in computing the tax which it has tendered, has deducted from its gross income not only the total amount of income from copyrights but also its expenses incurred in earning such income.

It is conceded by the appellant that its business is such that it is able to determine, not only the gross income from films which are copyrighted, which constitute about one-half of its business, but also the amount of its expenses in procuring such income, and it has alleged in its complaint, as amended, that the amount of such expenses for the year in question was $49,151.37.

It seems clear that, if such gross income is to be omitted, the amount of such expenses may not be deducted from its gross income from other sources in computing the net income which is to measure the tax.

We do not suppose that much law upon the subject can be found, for the reason that both the Federal Government and the states have always either taxed such income or included it in the measure of their franchise taxes. There are, however, certain analogous situations.

The Federal Government may not directly tax income from state and municipal bonds, and the present Revenue Act (45 Stat. 795-883), which imposes a *direct* tax upon income, accordingly excludes interest on such bonds from gross income (§ 21, subd. b-4). Interest paid by the taxpayer on indebtedness to purchase or carry such bonds may not, however, be deducted from

its gross income in determining the taxable net income. Section 23, defining allowable deductions, provides (subd. b.):

> "Interest.—All interest paid or accrued within the taxable year on indebtedness, except on indebtedness incurred or continued to purchase or carry obligations or securities (other than obligations of the United States issued after September 24, 1917, and originally subscribed for by the taxpayer) the interest upon which is wholly exempt from taxation under this title."

Similarly the Revenue Act excludes from gross income earned income of non-resident citizens received from sources without the United States (§ 116, subd. a), but the taxpayers' expenses properly allocable to or chargeable against such income may not be deducted. The section defining the exclusion provides:

> "Earned income from sources without the United States.—In the case of an individual citizen of the United States, a *bona fide* non-resident of the United States for more than six months during the taxable year, amounts received from sources without the United States if such amounts constitute earned income as defined in section 31; but such individual shall not be allowed as a deduction from his gross income any deductions properly allocable to or chargeable against amounts excluded from gross income under this subsection."

It is thus seen that wherever income from a tax-exempt source is excluded from gross income, the expenses in connection therewith may not be deducted.

The contention of the appellant would lead to the most absurd results, as will be seen from the following example. Suppose a corporation doing business within this State which had a gross income of $2,000,000, one-half of which was derived from copyrights and one-half from a non-exempt source, and which had expenses in

connection with the copyright business of $500,000 and a similar amount of expenses in connection with its other business. Its net income from the copyright business would be $500,000 and $500,000 from its taxable business. If the appellant's argument is sound, it could deduct from its gross of $2,000,000 its copyright income of $1,000,000 and its expenses of $1,000,000, and be relieved from the payment of any tax measured by income although it had enjoyed privileges granted by the State from which it had derived a net profit from non-exempt business of half a million dollars.

This is not an extreme example, as is shown by the fact that, in the instant case, the appellant claims the right to reduce its net income from concededly taxable business by nearly half (from $117,935.33 to $68,783.96) because of the expenses of the claimed non-taxable business.

Reference has been made to the fact that in such a case the corporation would be liable to a tax based on capital stock or on salaries. This is the minimum tax provision of the statute and is trifling compared with the tax measured by net income. It would produce in the instant case but $200 if based on the capital stock or $300 if based on the salaries, as against the assessment which has been made of $10,411.79 on the basis of net income.

If this statute is unconstitutional in its operation as to the appellant because of the taxation of income from tax-exempt sources, the most that the appellant can demand is that the tax be reduced to the extent necessary to prevent that result. That can be accomplished by deducting from the total gross income of the corporation the gross income from copyrights *less* the expenses of procuring the same.

The appellant cites on this point *National Life Insurance Co.* v. *United States*, 277 U. S. 508. We do not

see the application of that decision to any phase of the present controversy.

The situation in the *National Life Insurance* case was briefly this: The United States Revenue Act of 1921 imposed a direct net income tax upon life insurance companies. The statute provided that there should be deducted from the gross income (1) interest on tax-exempt securities and (2) an amount equal to the excess, if any, over the deduction specified in paragraph 1 (interest on tax-exempt securities) of 4 per centum of the mean of the reserve funds required by law. The effect of the statute was to give with one hand and take away with the other. The vice of it is summed up in one sentence taken from the prevailing opinion of Mr. Justice McReynolds (p. 519):

> "Thus, he (the Collector) required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities."

Answering the claim that there was no obligation on Congress to grant the second deduction, the learned Justice said (p. 522):

> "Congress had no power purposely and directly to tax state obligations by refusing to their owners *deductions allowed to others.*"

In the instant case, the denial of the deduction of the expenses of the business of leasing copyrighted films does not result in a tax greater than it would have been had the appellant not conducted that business; it results in exactly the same tax that it would have paid if it had no copyright business at all. What the appellant is demanding is that the tax on its taxable business be fixed at a much less sum because it happens also to have the copyright business.

Neither in the instant case are the deductions, which the plaintiff claims, deductions which are allowed to others. In the *National Life Insurance* case there was an arbitrary deduction of a percentage of the reserve funds required by law, which was allowed to all life insurance companies regardless of whether they held exempt securities or not. Under the statute we are now considering, no deduction of the expenses of an exempt business is allowed to anyone.

The appellant treats the subject as one of pure statutory construction. It is not that. If this Court shall hold that the application of the statute to the plaintiff has produced an unconstitutional result (a contingency which we do not anticipate), it will be called upon to determine to what extent the result is unconstitutional. The appellant concedes that it has no constitutional right to such a deduction. What, then, is the extent to which it may demand relief? Clearly no more than the elimination from its net income of so much thereof as was received from the copyright business.

CONCLUSION

The order of the District Court should be affirmed, with costs.

Respectfully submitted,

HAMILTON WARD,
Attorney General,
Counsel for Appellees.

WENDELL P. BROWN,
Third Assistant Attorney General,
Of Counsel.

APPENDIX A

XXX Columbia Law Review 1070-1071 (November 1930)

TAXATION—CONSTITUTIONAL LAW—CONSTITUTIONALITY OF FRANCHISE TAX MEASURED BY NET INCOME FROM COPYRIGHT.—Plaintiff, a New York corporation, seeks to enjoin defendant from collecting that part of a franchise tax[1] which results from using income derived from a copyright as a measure of the tax. *Held*, petition dismissed. A franchise tax measured by net income, though derived in part from a copyright, is an excise tax and therefore valid. *Educational Films Corporation of America* v. *Ward, Atty-Gen. of New York*, 41 F.(2d) 395 (S. D. N. Y. 1930).

The original pronouncement of the doctrine that a state may not tax a federal instrumentality[2] included the reservation that "all subjects over which the sovereign power of the state extends are objects of taxation * * *."[3] *A priori*, a property tax on federal stock was held invalid[4] but various excise taxes within the jurisdiction of the state were upheld though measured in part by income from federal instrumentalities.[5] Since *Western Union Telegraph Co.* v. *Kansas*[6] the Supreme Court of the United States has at times abandoned the subject test in favor of an economic criterion.[7] The latter inquires whether or not the instrumentality is in fact burdened, which seems a more practical and desirable test.[8] Still, the problem of validity often resolves itself into a determination of whether the tax, irrespective of the nomenclature employed by the state legislature or

1. N. Y. Tax Law, art. 9A, § 208 (3), 209, 211 (2), 215.
2. *McCulloch* v. *Maryland*, 4 Wheat. 316 (U. S. 1819).
3. *Ibid.*, at 429.
4. *Western* v. *City Council of Charleston*, 2 Pet. 449 (U. S. 1829).
5. *Society for Savings* v. *Coite*, 6 Wall. 594 (U. S. 1829); *Home Insurance Co.* v. *New York*, 134 U. S. 594, 10 Sup. Ct. 593 (1890); *Plummer* v. *Coler*, 178 U. S. 115, 20 Sup. Ct. 829 (1900).
6. 216 U. S. 1, 30 Sup. Ct. 190 (1910).
7. See Powell, *Indirect Encroachment on Federal Authority* (1918) 31 Harv. L. Rev. 321, 325.
8. See Note (1930) 30 Columbia Law Rev. 92, 103.

court, is on an immune subject or on a privilege granted by the taxing power.[9] So a license tax on domestic insurance companies was held invalid as a tax on a federal instrumentality when measured by gross income derived in part from United States bonds[10] although when measured by net income a similar tax was sustained.[11] In *Macallen Co.* v. *Massachusetts*,[12] a divided court, laying great stress on the fact that an amendment to the tax statute had withdrawn the exemption granted on income from federal securities, held a franchise tax, measured by net income, invalid as a covert attempt to tax income from such securities. This case might be given a narrow construction based solely on the legislative history[13] or else one much broader in effect, namely, to overrule *Home Insurance Co.* v. *New York*[14] and *Flint* v. *Stone Tracy*.[15] In *Long* v. *Rockwood*,[16] it was only by a five to four decision that an income tax was held invalid when assessed on patent royalties, due to the reluctance of the four dissenting justices to consider a patent a federal instrumentality. The constitutional provision makes no distinction between patents and copyrights.[17] If appealed, the tax in the instant case could be held unconstitutional only by combining the holding of *Long* v. *Rockwood* with the broader interpretation of *Macallen* v. *Massachusetts*. It is to be hoped that this result will not be reached as it is difficult to trace the relation between such a tax and a detrimental effect on the federal government.

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9. See *Northwestern Insurance Co.* v. *Wisconsin*, 275 U. S. 136, 140, 48 Sup. Ct. 55, 56 (1927).

10. *Ibid.*

11. *Home Insurance Co.* v. *New York*, *supra* note 4; *Flint* v. *Stone Tracy*, 220 U. S. 107, 31 Sup. Ct. 342 (1911); *cf. Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 41 Sup. Ct. 45 (1920).

12. 279 U. S. 620, 49 Sup. Ct. 432 (1928).

13. See *Aberdeen Savings & Loan Ass'n.* v. *Chase*, 289 Pac. 536, 543 (Wash. 1930); note (1929) 43 Harv. L. Rev. 280.

14. *Supra* note 5.

15. *Supra* note 11.

16. *Long* v. *Rockwood*, 277 U. S. 142, 48 Sup. Ct. 463 (1928).

17. United States Constitution, art. 1, § 8.

APPENDIX B

NEW YORK TAX LAW

ARTICLE 9-A

Franchise Tax on Business Corporations

Section 208. Definitions.

209. Franchise tax on corporations based on net income.

210. Corporations exempted from article.

211. Reports of corporations to tax commission.

212. Reports by corporation on basis of fiscal year.

213. Reports to be sworn to; forms.

214. Computation of tax.

214-a. Taxation of corporations acquiring assets or franchises of other corporations.

215. Rate of tax.

216. Penalty for failure to report.

217. Powers of tax commission.

218. Revision and readjustment of accounts by tax commission.

219. Review of determination of tax commission by certiorari and regulations as to writ.

219-a. Audit and statement of tax.

219-b. Notice of tax.

219-c. When tax payable.

219-d. Corrections and changes.

219-e. Warrant for the collection of taxes.

219-f. Action for recovery of taxes; forfeiture of charter by delinquent corporations.

219-g. Deposit of revenues collected.

219-h. Disposition of revenues collected.

219-i. Secrecy required of officials; penalty for violation.

219-j. Exemption from certain other taxation.
219-k. Limitation of time.
219-l. Personal property defined.

§ 208. **Definitions.** As used in this article:

1. The term "corporation" includes a joint-stock company or association and any business conducted by a trustee or trustees wherein interest or ownership is evidenced by certificate or other written instrument;

[Amended by ch. 376, L. 1922.]

2. The words "tangible personal property" shall be taken to mean corporeal personal property, such as machinery, tools, implements, goods, wares and merchandise, and shall not be taken to mean money, deposits in bank, shares of stock, bonds, notes, credits or evidences of an interest in property and evidences of debt;

3. The term "entire net income" means the total net income, including all dividends received on stocks and all interest received from federal, state, municipal or other bonds, except as otherwise provided by section two hundred and nine of the tax law, and without deduction for taxes paid to the government of the United States on either profits or net income and without deduction of any specific amount allowed by any taxing authority; but losses sustained by the corporation in other fiscal or calendar years whether deducted by the government of the United States or not shall not be deducted.

[Amended by ch. 582, L. 1928.]

§ 209. **Franchise tax on corporations based on net income.** For the privilege of exercising its franchise in this state in a corporate or organized capacity every domestic corporation, and for the privilege of doing business in this state, every foreign corporation, except

corporations specified in the next section, shall annually pay in advance for the year beginning November first next succeeding the first day of July in each and every year an annual franchise tax, to be computed by the tax commission upon the basis of its entire net income, as defined in subdivision three of section two hundred and eight of the tax law, for its fiscal or the calendar year next preceding, as hereinafter provided, which entire net income is presumably the same as the entire net income which such corporation is required to report to the United States, plus any income received as dividends on stocks or any interest received on bonds of any character, and without deduction for taxes paid on either profits or net income to the government of the United States or for any specific deduction allowed by any other authority, except that the entire net income of a corporation not organized under the laws of any state within the United States which shall be taken as the basis of computation by the tax commission shall be the entire net income in fact and determined as hereinbefore provided rather than the amount earned in the United States or the amount returned to the United States treasury department, or as otherwise provided by section two hundred and fourteen of the tax law. However, in determining the entire net income, for purposes of equitable taxation under this article of the tax law, the tax commission may include income from any source, provided only that the assets from which the income arose shall be included in any segregation for the purpose of computing the tax.

[Amended by ch. 385, L. 1929.]

§ 210. Corporations exempted from article. 1. Corporations wholly engaged in the purchase and sale of, and holding title to, real estate for themselves, and also corporations engaged in the business of subleasing real property held under a leasehold for a term of twenty

years or more, by the terms of which the taxes on the real property are paid by the lessee corporation as part of the consideration for the leasehold;

2. Corporations whose sole business consists of holding the stocks of other corporations for the purpose of controlling the management and affairs of such other corporations, except such as are specifically subject to report under the provisions of subdivision nine of section two hundred and eleven of the tax law; and

3. Corporations liable to tax under sections one hundred and eighty-four to one hundred and eighty-seven inclusive of this chapter, banks, banking associations, savings banks, institutions for savings, trust companies, title guaranty, insurance or surety corporations, and corporations taxable under articles nine-b and nine-c;

4. Farmers', fruit growers', and other like agricultural corporations organized and operated on a co-operative basis for the purposes expressed in and as provided under the co-operative corporations law of the state of New York.

Shall be exempt from the payment of the taxes prescribed by this article.

This section, as hereby amended, shall be construed as having been in effect as of March thirty-first, nineteen hundred and twenty-seven.

[Amended by ch. 583, L. 1928; subd. 4 added by ch. 363, L. 1929, effective April 8, 1929.]

§ 211. Reports of corporations to tax commission. Every corporation taxable under this article as well as foreign corporations having officers, agents or representatives within the state shall annually on or before July first, or within thirty days after the making of its report of entire net income to the United States treasury department for any fiscal or calendar year, preced-

ing said first day of July, transmit to the tax commission a report in the form prescribed by the tax commission, specifying: 1. The name and location of the principal place of business of such corporation, the state under the laws of which organized, and the date thereof; the amount of its issued capital stock and the kind of business transacted. Any corporation not organized under the laws of any state within the United States shall state the facts in relation to its entire net income wherever earned and as though organized under the laws of this state, and instead of stating its income as returned to the United States treasury department. If any corporation is not subject to a franchise tax based on net income, and is incorporated and issues capital stock, or increases its issued capital stock, after the thirtieth day of June and prior to the first day of November in any year, it shall forthwith report to the tax commission the amount of such increase or issue and shall be taxable thereon as though increased or issued prior to the first day of July and as provided by section two hundred and fourteen of the tax law.

2. The amount of its entire net income for its preceding fiscal or the preceding calendar year as provided by subdivision three of section two hundred and eight of the tax law, except as provided in subdivision one of this section. If the corporation shall claim that the return made to the United States treasury department was inaccurate, the amount claimed by it to be the net income for such period shall be specified. If any deduction has been allowed for losses sustained by the corporation in prior years the amount so allowed and deducted shall be specified.

3. The average monthly value for the fiscal or calendar year of its real property and tangible personal property in each city, village or portion of a town outside of

a village within the state, and the average monthly value of all its real property and tangible personal property wherever located.

4. The average monthly value for the fiscal or calendar year of bills and accounts receivable arising from (a) personal property sold by the corporation from merchandise manufactured by it within this state; (b) personal property owned by the corporation and not manufactured by it within this state but sold by it or its agents and located within the state at the time of the receipt of the order; (c) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the state, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this state; and (d) services performed by any officer, agent or representative of the corporation connected with, sent from, or reporting, either directly or indirectly, to any officer located in this state or at any office located, owned, rented or occupied in this state. Also the average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from the manufacture by it of personal property or the purchase or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

5. The average total value for the fiscal or calendar year of the stock of other corporations owned by the corporation, and the proportion of the average value of the stock of such other corporations within the state of New York, as allocated pursuant to section two hundred and fourteen of this chapter.

6. If the corporation has no real or tangible personal property within the state, the city, village or portion of a town outside of a village in the state in which is located the office in which its principal financial concerns within the state are transacted.

7. Such other facts as the tax commission may require for the purpose of making any computation required by this article, or for the purpose of comparison with former reports to determine whether or not such reports were erroneous or fraudulent.

8. Any corporation taxable hereunder upon its entire net income may omit from its report the statements required by subdivisions four and five by incorporating in its report a consent to be taxed upon its entire net income. Corporations having no net income shall, however, complete the segregation of assets in every case.

9. Any corporation liable to report under this article and owning, or controlling, either directly or indirectly, substantially all of the capital stock of another corporation, or of other corporations, may be required to make a consolidated report showing the combined net income, such assets of the corporation as are required for the purposes of this article, and such other information as the tax commission may require, but excluding intercorporate stockholdings and intercorporate accounts. Any corporation liable to report under this article and owned or controlled, either directly or idirectly, by another corporation may be required to make a report consolidated with the owning company, showing the combined net income, such assets of the corporation as are required for the purposes of this article, and such other information as the tax commission may require, but excluding intercorporate stockholdings and intercorporate accounts. In case it shall appear to the tax com-

mission that any arrangement exists in such a manner as to improperly reflect the business done, the segregable assets or the entire net income earned from business done in this state, the tax commission is authorized and empowered, in such manner as it may determine, to equitably adjust the tax and to eliminate any assets included in the segregation thereof, provided only that any income directly traceable thereto be also excluded from entire net income.

The tax commission may permit or require the filing of a combined report where substantially all the capital stock of two or more corporations liable to report under this article is owned or controlled by the same interests. The tax commission may impose the tax provided by this article as though the combined entire net income and segregated assets were those of one corporation, but in the computation dividends received from any corporation whose assets, as distinguished from shares of stock, are included in the segregations, shall not be included in net income, or may, in such other manner as it shall determine, equitably adjust the tax.

10. Where any corporation liable to taxation under this article conducts the busines, whether under agreement or otherwise in such manner as either directly or indirectly to benefit the members or stockholders of the corporation, or any of them, or any person or persons, directly or indirectly interested in such business by selling its products or the goods or commodities in which it deals at less than a fair price which might be obtained therefor, or where such a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and disposes of the products of the corporation so owning the substantial portion of its capital stock in such a manner as to create a loss or improper net income, the tax commission may require such facts as it deems necessary

for the proper computation provided by this article, and may for the purpose of the act determine the amount which shall be deemed to be the entire net income of the business of such corporation for the calendar or fiscal year, and in determining such entire net income the tax commission shall have regard to the fair profits which, but for any agreement, arrangement or understanding, might be or could have been obtained from dealing in such products, goods or commodities.

11. If it shall appear to the tax commission that the segregation of assets shown by any report made under this article does not properly reflect the corporate activity or business done, or the income earned from corporate activity or from business done in this state because of the character of the corporation's business and the character and location of its assets, the tax commission is authorized and empowered to equitably adjust the tax upon the basis of the corporate activity or the business done within and without the state rather than upon capital or assets employed.

12. Whenever a corporation exempted by either subdivision one or two of section two hundred and ten of the tax law owns a controlling interest in any corporation taxable under article nine-a, or is owned or controlled by any corporation taxable under article nine-a, and any part of the property of the corporation exempted by either subdivision one or two of section two hundred and ten is used or occupied in the conduct of the business of the corporation taxable under article nine-a, the exemption extended by subdivisions one and two of section two hundred and ten of the tax law shall be annulled, and they may be required to make a consolidated report including the segregable assets and the entire net income of the consolidated companies for the

purposes of taxation and be taxed under article nine-a of the tax law.

[Amended by ch. 145, L. 1929.]

§ 212. Reports by corporation on basis of fiscal year. A corporation which reports to the United States treasury department on the basis of its fiscal year, may report to the tax commission upon the same basis, except as provided in section two hundred and fourteen-a of this chapter. Any corporation which has been permitted to change the period for which it shall make its report shall, in its next report to the tax commission, include its entire net income which has not been used or included in measuring a franchise tax to this state whether such income arose over a period of more or less than one year.

[Amended by ch. 507, L. 1922.]

§ 213. Reports to be sworn to; forms. Every report required by this article shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the corporation to the effect that the statements contained therein are true. Blank forms of report shall be furnished by the tax commission, on application, but failure to secure such a blank shall not release any corporation from the obligation of making a report herein required. The commission may require a further or supplemental report under this article to contain further information and data necessary for the computation of the tax herein provided.

[Added by ch. 726, L. 1917.]

§ 214. Computation of tax. If the entire business of the corporation be transacted within the state, the tax imposed by this article, if imposed upon the entire net income, shall be based upon the entire net income of such corporation for such fiscal or calendar year as de-

fined in section two hundred and eight of this chapter, subject, however, to any correction thereof for fraud, evasion or error, as ascertained by the state tax commission. If the entire business of such corporation be not transacted within the state, the tax imposed by this article shall be based upon a proportion of such entire net income, to be determined in accordance with the following rules: The proportion of the entire net income of the corporation upon which the tax under this article shall be based, shall be such portion of the entire net income as the aggregate of

1. The average monthly value of the real property and tangible personal property within the state.

2. The average monthly value of bills and accounts receivable arising from (a) personal property sold by the corporation from merchandise manufactured by it within the state; (b) personal property owned by the corporation and not manufactured by it within this state but sold by it or its agents and located within the state at the time of the receipt of the order; (c) the purchase or sale of, or trading in, goods, wares or merchandise not located at any place at which the corporation conducted a permanent or continuous business without the state, and where the bills and accounts receivable arose from orders received or accepted by any officer or agent, or at any place of business, in this state; and (d) services performed by any officer, agent or representative of the corporation connected with, sent from, or reporting, either directly or indirectly, to any officer located in this state or at any office located, owned, rented or occupied in this state.

3. The proportion of the average value of the stocks of other corporations owned by the corporation, allocated to the state as provided by this section, bears to the aggregate of

4. The average monthly value of all the real property and tangible personal property of the corporation, wherever located.

5. The average total monthly value for the fiscal or calendar year of bills and accounts receivable arising from (a) personal property sold by the corporation from merchandise manufactured by it within and without the state; and (b) the purchase, or sale of, or trading in, personal property, or from services performed by the corporation, its officers or agents, excluding those arising in any way from advances or loans.

6. The average total value of stocks of other corporations owned by the corporation.

7. In case any report is made as provided by subdivisions nine, ten, eleven and twelve of section two hundred and eleven of the tax law, the tax commission may assess the tax against either of the corporations whose assets or net income are involved in the report and upon the basis of the combined entire net income and the combined segregated assets of the corporations and upon such other information as it may possess, or may adjust the tax in such other manner as it shall determine to be equitable.

8. If any corporation has been permitted to change the period for which it shall make its report, it shall be taxed upon the entire net income which has not been used or included in measuring a franchise tax to this state as though the entire net income had been earned within one year.

9. Real property and tangible personal property shall be taken at its actual value where located. The value of share stock of another corporation owned by a corporation liable hereunder shall for purposes of allocation of assets be apportioned in and out of the state

in accordance with the value of the physical property in and out of the state representing such share stock.

10. It is further provided that every domestic corporation for the privilege of exercising its franchise in this state, other than one exempted by section two hundred and ten of this chapter, shall be subject to a minimum tax of (1) not less than ten dollars and (2) not less than one mill upon each dollar of its issued capital stock at its face value, and (3) not less than would be produced by applying a rate of two per centum to a base consisting of the entire net income plus salaries and other compensation paid to all elected or appointed officers, and to any stockholder owning in excess of five per centum of the issued capital stock of the corporation, excepting dividends, and after deducting from the base six thousand dollars and any deficit for the reported year; whichever would result in the largest amount of tax. If such corporation actually maintains a regular place of business outside of the state of New York and actually employs capital outside of the state of New York, then such tax shall be computed upon such a part of its issued capital stock at its face value as the amount of its gross assets in this state bears to its gross assets wherever located. But if such corporation has stock without par value, then the base of the tax, with relation to such stock, shall be such issued capital stock, at not less than its actual or market value, and not less than five dollars per share, as may be determined by the state tax commission, apportioned as herein provided. Every corporation, joint-stock company or association, organized, incorporated or formed under the laws of any other state, country or sovereignty, other than those exempted by section two hundred and ten of the tax law, shall pay a like tax for the privilege of carrying on business in a corporate or organized capacity in this state, to be computed upon the basis of measurement hereinbefore pro-

vided for the taxation of domestic corporations. Any corporation newly organized prior to November first of any year, or any foreign corporation beginning business in this state prior to November first of any year, and any corporation whose capital stock is increased between the thirtieth day of June and the first day of November in any year, either of which is not subject to a franchise tax on net income as provided in section two hundred and nine of this article, shall be subject to the minimum tax as hereinbefore provided, based on its issued capital stock as of the thirty-first day of October of such year.

If such corporation is subject to a tax under the provisions of this article of the tax law, and it maintains no regular place of business outside of this state, except a statutory office, it shall be taxed upon its entire net income, or entire issued capital stock, or otherwise, as hereinbefore provided.

[Amended by ch. 385, L. 1929.]

§ 214-a. **Taxation of corporations acquiring assets or franchises of other corporations.** (Omitted.)

[Amended by ch. 323, L. 1925.]

§ 215. **Rate of tax.** The tax imposed by this article shall be at the rate of four and one-half per centum of the entire net income of the corporation or portion thereof taxable within the state, determined as provided by this article, unless taxable as provided in subdivision ten of section two hundred and fourteen of the tax law.

[Amended by ch. 385, L. 1929.]

§ 216. **Penalty for failure to report.** Any corporation which fails to make any report required by this article shall be liable to a penalty of not more than five thousand dollars to be paid to the state, to be assessed and collected in the manner provided for the assessment

and collection of taxes under this article, or in a civil action, at the instance of the tax commission; and any officer of any such corporation who makes a fraudulent return or statement with intent to defeat or evade the payment of the taxes prescribed by this article shall be liable to a penalty of not more than one thousand dollars, to be assessed and collected in like manner.

[Amended by ch. 507, L. 1922.]

§ 217. Powers of tax commission. The tax commission may for good cause shown extend the time within which any corporation is required to report by this article. If any report required by this article be not made as herein required, the tax commission is authorized to make an estimate of the net income of such corporation and of the amount of tax due under this article, from any information in its possession, and to order and state an account according to such estimate for the taxes, penalties and interest due to the state from such corporation. All the authority and powers conferred on the tax commission by the provision of section one hundred and ninety-five of the tax law shall have full force and effect in respect of corporations which may be liable hereunder.

[Amended by ch. 640, L. 1920.]

§ 218. Revision and readjustment of accounts by tax commission. If an application for revision be filed with the commission by a corporation against which an account is audited and stated within one year from the time any such account shall have been audited and stated, the commission shall grant a hearing thereon, and if it shall be made to appear upon any such hearing by evidence submitted to it, or otherwise, that any such account included taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such account, or if it

appears that the tax as originally assesed was less than should have been exacted, the commission shall resettle the same according to law and the facts by increasing or diminishing the taxes and other charges, and adjust the accounts accordingly, and may, in its discretion, modify the penalty imposed for failure to report as provided in this article, and shall send notice of its determination thereon to the corporation forthwith.

If it appears from such reassessment that such corporation shall have paid an excess of tax under this article for the year for which such reassessment is made, the tax commission shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit, on filing with the commission such assignment, shall thereupon be entitled to credit upon the books of the tax commission for the amount thereof on the current account for taxes of such assignee, in the same manner and to the same effect as though the credit had originally been allowed in favor of such assignee, or the amount of such credit, without interest, may be refunded to such corporation out of any revenues received under this article to the credit of the state comptroller, at the direction of the state tax commission.

The amount or amounts of such excess shall be charged against the state treasury and the taxing district or districts in the proportions that such excess was originally credited or paid. In case the amount of current revenues credited to any taxing district, under this article, is not equal to the charge against any such taxing district on account of any such refund, revenues from all interest and penalties on deposit, under this article, may, until such taxing district revenues are available, be advanced and used for the purposes of such refund.

Any moneys thereafter credited to such taxing district, under this article, shall first be applied to the payment of any such advancement.

This section, as hereby amended, shall be construed as having been in effect as of the date of the original enactment of article nine-a of the tax law, as added by chapter seven hundred and twenty-six of the laws of nineteen hundred and seventeen.

[Amended by ch. 184, L. 1929.]

§ 219. Review of determination of tax commission by certiorari and regulations as to writ. The determination of the commission upon any application made to it by any corporation for revision and resettlement of any account, as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter.

No certiorari to review any audit and statement of an account or any determination by the commission under this article shall be granted unless notice of application therefor is made within ninety days after the service of the notice of such determination. Eight days' notice shall be given to the commission of the application for such writ. The full amount of the taxes, percentage, interest and other charges audited and stated in such account must be deposited with the state tax commission before making the application and an undertaking filed with the commission, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against it in the prosecution of the writ, including costs of all appeals.

[Amended by ch. 20, L. 1928.]

§ 219-a. **Audit and statement of tax.** The tax commission shall audit and state the account of each corporation known to be liable to a tax under this article, as hereinbefore provided, and shall compute the tax thereon and proceed to collect the same. The tax commission shall determine the portion of such tax to be distributed to the several counties and the amounts to be credited to the several cities or towns thereof, when the same is collected and shall certify the same to the state comptroller.

[Amended by ch. 507, L. 1922.]

§ 219-b. **Notice of tax.** Every report required by section two hundred and eleven of this chapter shall contain the post-office address of the corporation and lines or spaces upon which the corporation shall enter its entire net income. Notice of tax assessment shall be sent by mail to the post-office address given in the report, and the record that such notice has been sent shall be presumptive evidence of the giving of the notice and such record shall be preserved by the tax commission.

[Amended by ch. 628, L. 1919.]

§ 219-c. **When tax payable.** The tax hereby imposed shall be paid to the state tax commission on or before the first day of January of each year, or within thirty days after notice of the tax has been given as provided in section two hundred and nineteen-b of this chapter if such notice is given subsequent to the first day of December of the year for which such tax is imposed. If such tax be not so paid, or in the case of additional taxes, if not paid within thirty days after notice of such additional tax has been given as provided in section two hundred and nineteen-d of this chapter and such notice of additional tax is given subsequent to the first day of December of the year for which such additional tax is imposed, the corporation liable to such tax shall pay to

the state tax commission, in addition to the amount of such tax, or additional tax, ten per centum of such amount, plus one per centum for each month the tax or additional tax remains unpaid, but the state tax commission upon submission to it of satisfactory proof that the failure to pay such taxes or additional taxes, within the time prescribed in this article, was not wilful or evasive, may modify the exaction. Each such tax or additional tax shall be a lien and binding upon the real and personal property of the corporation liable to pay the same until the same is paid in full. But the lien of each such tax or additional tax shall be subject to the lien of any mortgage indebtedness existing against real property previous to the time when the tax or additional tax is due and payable and where such mortgage indebtedness has been incurred in good faith and was not given, directly or indirectly, to any officer or stockholder of the corporation owning such real property, whether as a purchase money mortgage or otherwise. Where title to real property passes from an individual, or from a corporation owing no franchise tax or additional tax, to another corporation which is in default for such tax or additional tax, the lien herein provided shall not be enforceable except as to any equity after the prior mortgage encumbrance.

The tax commission may, upon application made to it and the payment of a fee of five dollars, release any real property from the lien of any franchise tax due, and or to become due, imposed by articles nine and/or nine-a of the tax law, provided payment be made to the state tax commission of such a sum as the tax commission shall deem adequate consideration for such release, or deposit be made of such security or such bond be filed as the tax commission shall deem proper to secure payment of any franchise tax or taxes the lien of which is being released. The application for such release shall

contain an accurate description of the property to be released together with such other information as the tax commission may require. Such release shall be given under the seal of the tax commission and may be recorded in any office in which conveyances of real estate are entitled to be recorded.

[Amended by ch. 170, L. 1929, effective July 1, 1929.]

§ 219-d. **Corrections and changes.** If the amount of the net income for any year of any corporation taxable under this article as returned to the United States treasury department is changed or corrected by the commissioner of internal revenue or other officer of the United States or other competent authority, such corporation, within ten days after the receipt of notice of such change or correction, shall make return under oath or affirmation to the tax commission of such changed or corrected net income, and shall concede the accuracy of such determination or state wherein it is erroneous.

The tax commission shall ascertain, from such return and any other information in the possession of the commission, the entire net income of such corporation for the fiscal or calendar year for which such change or correction has been made by such commissioner of internal revenue or other officer or authority. All the authority conferred on the tax commission by the provisions of sections one hundred and ninety-five and two hundred and seventeen of this chapter is hereby granted to it in respect to the ascertainment of such entire net income. The tax commission shall thereupon reaudit and restate the account of such corporation for taxes based upon the entire net income as changed or corrected for such fiscal or calendar year but without change of the segregation of assets upon which the original assessment was based, such reaudit to be according to the entire net income so ascertained by the

tax commission. The proceedings and determinations of the tax commission in the making of such reassessment may be revised and readjusted and reviewed in the manner provided by sections two hundred and eighteen and two hundred and nineteen of this chapter, as in the case of an original assessment of the tax. If from such reassessment it appears that such corporation shall have paid under this article an excess of tax for the year for which such reassessment is made, the tax commission shall credit such corporation with such amount. Such credit may be assigned by the corporation in whose favor it is allowed to a corporation liable to pay taxes under this article, and the assignee of the whole or any part of such credit on filing with the commission such assignment shall thereupon be entitled to credit upon the books of the tax commission for the amount thereof on the current account for taxes of such assignee in the same way and with the same effect as though the credit had originally been allowed in favor of such assignee; or the amount of such credit, without interest, may be refunded to such corporation out of any revenues, received under this article, to the credit of the state comptroller, at the direction of the state tax commission. The amount or amounts of such excess shall be charged against the state treasury and the taxing district or districts in the proportions that such excess was originally credited or paid. In case the amount of current revenues credited to any taxing district under this article, is not equal to the charge against any such taxing district on account of any such refund, revenues from all interest and penalties on deposit, under this article, may, until such taxing district revenues are available, be advanced and used for the purposes of such refund. Any moneys thereafter credited to such taxing district, under this article, shall first be applied to the payment of any such advancement. If

from such reassessment it appears that an additional tax is due from such corporation for such year, such corporation shall, within thirty days after notice has been given as provided in section two hundred and nineteen-b of this chapter by the tax commission, pay such additional tax.

This section, as hereby amended, shall be construed as having been in effect as of the date of the original enactment of article nine-a of the tax law, as added by chapter seven hundred and twenty-six of the laws of nineteen hundred seventeen.

[Amended by ch. 183, L. 1929.]

§ 219-e. **Warrant for the collection of taxes.** (Omitted.)

[Amended by ch. 551, L. 1926.]

§ 219-f. **Action for recovery of taxes; forfeiture of charter by delinquent corporations.** (Omitted.)

[Amended by ch. 297, L. 1929.]

§ 219-g. **Deposit of revenues collected.** (Omitted.)

[Amended by ch. 507, L. 1922.]

§ 219-h. **Disposition of revenues collected.** (Omitted.)

§ 219-i. **Secrecy required of officials; penalty for violation.** (Omitted.)

§ 219-j. **Exemption from certain other taxation.** After this article takes effect, corporations taxable thereunder shall not be assessed on any personal property, or on capital stock as provided for in section twelve of this chapter.

[Amended by ch. 286, L. 1926.]

§ 219-k. **Limitation of time.** The provisions of the code of civil procedure relative to the limitation of time

of enforcing a civil remedy shall not apply to any proceeding or action taken to levy, appraise, assess, determine or enforce the collection of any tax or penalty prescribed by this article.

[Added by ch. 726, L. 1917.]

§ 219-l. Personal property defined. The term "personal property," for the purposes of the exemption from assessment and taxation thereon locally as granted by section two hundred and nineteen-j of this chapter, shall include any movable machinery and equipment used for trade or manufacture and not essential for the support of the building, structure or superstructures, and removable without material injury thereto. The term "personal property," as used in such section, shall not include boilers, ventilating apparatus, elevators, plumbing, heating, lighting and power generating apparatus, shafting other than counter-shafting, equipment for the distribution of heat, light, power, gases and liquids, nor any equipment consisting of structures or erections to the operation of which machinery is not essential. An owner of a building is entitled to the same exemption under this section as a lessee.

[Amended by ch. 628, L. 1919.]

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 350.—October Term, 1930.

Educational Films Corporation of America, Appellant, *vs.* Hamilton Ward, Attorney General of the State of New York and Thomas Lynch, et al.	Appeal from the District Court of the United States for the Southern District of New York.

[January 12, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 238 of the Judicial Code from a decree of a District Court of three judges for Southern New York, 41 F. (2d) 395, which dismissed, on the merits, the bill of complaint by which appellant, a New York corporation, sought to restrain appellees, the New York State Tax Commission, from the collection of a tax, on the ground that the taxing statute, as applied, infringes the federal Constitution.

Section 209[1] of Article 9-A of the New York Tax Law lays an

[Laws N.Y., 1929, c. 385]

[1] § 209. Franchise tax on corporations based on net income. For the privilege of exercising its franchise in this state in a corporate or organized capacity every domestic corporation, and for the privilege of doing business in this state, every foreign corporation, except corporations specified in the next section, shall annually pay in advance for the year beginning November first next succeeding the first day of July in each and every year an annual franchise tax, to be computed by the tax commission upon the basis of its entire net income, as defined in subdivision three of section two hundred and eight of the tax law, for its fiscal or the calendar year next preceding, as hereinafter provided, which entire net income is presumably the same as the entire net income which such corporation is required to report to the United States, plus any income received as dividends on stocks or any interest received on bonds of any character, and without deduction for taxes paid on either profits or net income to the government of the United States or for any specific deduction allowed by any other authority, except that the entire net income of a corporation not organized under the laws of any state within the United States which shall be taken as the basis of computation by the tax commission shall be the entire net income in fact and determined as hereinbefore provided rather than the amount earned in the United States or the

annual tax on every domestic corporation of certain classes "for the privilege of exercising its franchise in this state in a corporate or organized capacity". The tax is payable in advance for each year beginning November 1st, and is at the rate of 4½% of so much of the corporation's entire net income for its preceding fiscal year as is, under other sections, allocated to the business carried on within the state. By § 209 the net income embraces "income from any source", and "is presumably the same as the entire net income" reported for income taxation to the United States, "plus . . . dividends on stocks or any interest received on bonds of any character". Subdivision 3 of § 208 provides: "The term 'entire net income' means the total net income, including all dividends received on stocks and all interest received from federal, state, municipal or other bonds . . . ." Appellant's bill of complaint sets up that during its fiscal year ending June 30, 1929, it was the owner of copyrights granted by the United States upon motion picture films, and had received royalties from the licensing of them. It challenges the tax assessed against it under the statute, for the year beginning November 1, 1929, so far as it is measured by the amount of the royalties.

Appellant's contention is based on two propositions, both essential to its conclusion that the tax is invalid. They are, first, that the copyrights and all income derived from them are immune from state taxation since they, like patents, are instrumentalities of the federal government, taxation of which the Constitution impliedly forbids, see *Long* v. *Rockwood*, 277 U. S. 142; and, second, that the present tax, measured by net income, is void, so far as the measure includes income from the copyrights, because a tax on federal instrumentalities.[2]

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amount returned to the United States Treasury Department, or as otherwise provided by section two hundred and fourteen of the tax law. However, in determining the entire net income, for purposes of equitable taxation under this article of the tax law, the tax commission may include income from any source, provided only that the assets from which the income arose shall be included in any segregation for the purpose of computing the tax.

[2]The equity jurisdiction to enjoin collection of the tax is not challenged. The legal remedy provided by the statute for the recovery of taxes after payment falls short of adequacy in at least two respects. Refund, if any, is expressly without interest. § 219 (d). See Proctor & Gamble Distributing Co. *v.* Sherman, 2 F. (2d) 165; Southern California Telephone Co. *v.* Hopkins, 13 F. (2d) 814, 820, aff'd. 275 U. S. 393. If judicial review of the

For present purposes it is enough if we direct our attention to the second proposition. At the outset appellant contends that the tax, although stated in the taxing act to be on corporate franchises, is in reality a tax on income, and as such falls within the class of taxes which concededly may not be directly imposed on federal instrumentalities. In support of the contention, it points to the language of the statute, (§§ 214 (a) and 214 (8), dealing with the computation of the tax), and to an opinion of the New York Court of Appeals, (*Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, 57), which refer to the tax as one "upon income".

So far as these considerations are of weight, they are counterbalanced by the later pronouncement of the same court in *People ex rel. Bass, Ratcliff & Gretton* v. *Tax Commission*, 232 N. Y. 42, 46: ". . . although we have said in another connection (*People ex rel Alpha P. C. Co.* v. *Knapp, supra*, p. 57) that 'the tax imposed upon this franchise must be held in practical operation to be a tax upon the income . . . . This tax is equivalent to a tax upon relator's income,' it is primarily a tax levied for the privilege of doing business in the state."

But the nature of a tax must be determined by its operation rather than by particular descriptive language which may have been applied to it. As was said in *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625, 626, ". . . neither state courts nor legislatures, by giving the tax a particular name, or by using some form of words, can take away our duty to consider its nature and effect. . . . this Court must determine for itself by independent inquiry whether the tax here is what, in form and by the decision of the state court, it is declared to be . . . ". On appeal from the state court in *People ex rel. Bass, Ratcliff & Gretton* v. *Tax Commission, supra*, this Court upheld the tax and defined its nature, saying, 266 U. S. 271, 280: "It is not a direct tax upon the allocated income of the corporation in a given year, but a tax for the privilege of doing business in one year measured by the allo-

action of the state tax commission in assessing the tax results in a determination that such action was illegal, the statute calls for the credit of so much of the tax as was illegally exacted, or refund at the direction of the commission. But it is at least doubtful whether any refund can be compelled. § 219 (d). See Gorham Mfg. Co. v. Travis, 274 Fed. 975, aff'd. 266 U. S. 265; Dawson v. Kentucky Distilleries Co., 255 U. S. 288, 295, 296.

cated income accruing from the business in the preceding year. See *New York* v. *Jersawit*, 263 U. S. 493, 496." See also *Home Insurance Co.* v. *New York*, 134 U. S. 594; *People ex rel. United States Aluminum Printing Plate Co.* v. *Knight*, 174 N. Y. 475; *Anderson* v. *Forty-two Broadway Co.*, 239 U. S. 69.

If we look to the operation of the present statute, it is plain that it can have no application independent of the corporation's enjoyment of the privilege of exercising its franchise. If appellant had ceased to do business before November 1, 1929, it would not have been subject to any tax under this statute, although it had received, during its preceding fiscal year, income which the statute makes the measure of the tax. Since it can be levied only when the corporation both seeks or exercises the privilege of doing business in one year and has been in receipt of net income during its preceding fiscal year, the tax, whatever descriptive terms are properly applicable to it, obviously is not exclusively on income apart from the franchise. Hence we pass to the chief objection urged against it, that such a tax, however described, and even though deemed to be a tax on franchises, is invalid so far as it is measured by income derived from a federal instrumentality.

Under the Constitution the privilege of exercising the corporate franchise is the legitimate object, and the immunity of federal instrumentalities from taxation, a legitimate restriction, of the state power to tax. To give both to the power and to the immunity such a practical construction as will not unduly restrict the power of the government imposing the tax, or the exercise of the functions of the government which may be affected by it, is the problem necessarily involved in determining the extent of the immunity. See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 523, 524. So far as it concerns the power of a state to impose a tax on corporate franchises, the problem has long since ceased to be novel. While this Court, since *McCulloch* v. *Maryland*, 4 Wheat. 316, has consistently held that the instrumentalities of either government, or the income derived from them, may not be made the direct object of taxation by the other, *Weston* v. *City Council of Charleston*, 2 Pet. 449; *Dobbins* v. *Commissioners of Erie County*, 16 Pet. 435; *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Federal Land Bank* v. *Crosland*, 261 U. S. 374, it has held with like consistency that the privilege of ex-

ercising the corporate franchise is no less an appropriate object of taxation by one government merely because the corporate property or net income, which is made the measure of the tax, may chance to include the obligations of the other, or the income derived from them. The constitutional power of one government to reach this permissible object of taxation may not be curtailed because of the indirect effect which the tax may have upon the other.

The precise question now presented was definitely answered in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 162, *et seq.*, which upheld a federal tax, levied upon a corporate franchise granted by a state, but measured by the entire corporate income, including, in that case, income from tax exempt municipal bonds. In reaching this conclusion, the Court reaffirmed the distinction, repeatedly made in earlier decisions, between a tax, invalid because laid directly on governmental instrumentalities or income derived from them, and an excise which is valid because imposed on corporate franchises, even though the corporate property or income which is the measure of the tax embraces tax exempt securities or their income. See *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Hamilton Co.* v. *Massachusetts*, 6 Wall. 632; *Home Insurance Co.* v. *New York*, *supra*.

Upon a like principle other forms of excise tax have been upheld, although the statutory measure of the tax included securities constitutionally immune from any form of direct taxation. A state inheritance or legacy tax is valid, although measured by the value of United States bonds which are transmitted. *Plummer* v. *Coler*, 178 U. S. 115. See also *Orr* v. *Gilman*, 183 U. S. 278; *Blodgett* v. *Silberman*, 277 U. S. 1; cf. *Greiner* v. *Lewellyn*, 258 U. S. 384; *Willcutts, Collector* v. *Bunn*, No. 22, October Term, 1930, decided January 5, 1931. By parity of reasoning an inheritance tax may be levied by a state on a bequest to the United States, *United States* v. *Perkins*, 163 U. S. 625, and by the United States on a bequest to a municipality, *Snyder* v. *Bettman*, 190 U. S. 249. Similarly, state laws, taxing to stockholders, at full value, shares in national banks, are upheld, although the banks own tax exempt United States bonds. *VanAllen* v. *Assessors*, 3 Wall. 573, 583; *People* v. *Commissioners*, 4 Wall. 244, 255; *Peoples National Bank of Kingfisher* v. *Board of Equalization*, 260 U. S. 702; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103, 112 *et seq.* A tax on net income is not a forbidden tax on exports because it includes receipts from exports in

the computation of the income, *Peck & Co.* v. *Lowe*, 247 U. S. 165; *Barclay & Co.* v. *Edwards*, 267 U. S. 442; nor is the inclusion in a state income tax of receipts from interstate commerce a prohibited burden on commerce. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321; *Shaffer* v. *Carter*, 252 U. S. 37, 57; cf. *Interborough Rapid Transit Co.* v. *Somer*, 237 U. S. 276, 283, 284. It has been held that a state tax upon the franchise of a corporation, measured by its receipts from transportation, properly apportioned to the business done within the state, is valid, although including receipts from interstate commerce. *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217; cf. *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217. A state may not tax tangible property located beyond its boundaries, *Union Transit Co.* v. *Kentucky*, 199 U. S. 194; but it may measure a tax on franchises of domestic corporations by corporate property, even though without the state. *Kansas City Railway* v. *Kansas*, 240 U. S. 227; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325. So well settled is this last mentioned application of the doctrine that an excise may be measured by tax immune property, that an appeal in which such a tax was assailed on the very grounds urged here, was dismissed per curiam during the present term. No. 108, *Nebraska ex rel. Beatrice Creamery Co.* v. *Marsh*, decided October 20, 1930.

It is said that there is no logical distinction between a tax laid on a proper object of taxation, measured by a subject matter which is immune, and a tax of like amount imposed directly on the latter; but it may be said with greater force that there is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation, and which would not be open to question if its amount were arrived at by any other non-discriminatory method.

This Court, in drawing the line which defines the limits of the powers and immunities of state and national governments, is not intent upon a mechanical application of the rule that government instrumentalities are immune from taxation, regardless of the consequences to the operations of government. The necessity for marking those boundaries grows out of our Constitutional system, under which both the federal and the state governments exer-

cise their authority over one people within the territorial limits of the same state. The purpose is the preservation to each government, within its own sphere, of the freedom to carry on those affairs committed to it by the Constitution, without undue interference by the other. *McCulloch* v. *Maryland*, *supra*, p. 405; *The Collector* v. *Day*, 11 Wall. 113, 125; *Railroad Co.* v. *Peniston*, 18 Wall. 5, 31; *South Carolina* v. *United States*, 199 U. S. 437, 461; *Flint* v. *Stone Tracy Co.*, *supra*, pp. 154, 172; *Metcalf & Eddy* v. *Mitchell*, *supra*, pp. 523, 524.

Having in mind the end sought, we cannot say that the rule applied by this Court for some seventy years, that a non-discriminatory tax upon corporate franchises is valid, notwithstanding the inclusion of tax exempt property or income in the measure of it, has failed of its purpose, or has worked so badly as to require a departure from it now; or that the present tax, viewed in the light of actualities, imposes any such real or direct burden on the federal government as to call for the application of a different rule.

The decision of this Court in *Macallen Co.* v. *Massachusetts*, *supra*, upon which appellant relies, was not such a departure. That case did not overrule *Flint* v. *Stone Tracy Co.*, *supra*. Instead, the opinion rested the decision on the distinguishing fact that the tax exempt securities were included in the measure of the franchise tax by virtue of an amendment to the taxing statute which, it was held, was specifically intended to reach the income from tax exempt national and municipal bonds which had previously not been included in the measure of the tax. The case was thus brought within the purview of *Miller* v. *Milwaukee*, 272 U. S. 713, in which this Court had stated, with respect to a state tax on income, no franchise or privilege tax being involved: "If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good." But, as the Court in that case was careful to point out, in language later quoted with approval in *Macallen Co.* v. *Massachusetts*, p. 631, "A tax very well may be upheld as against any casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them . . . ."

It cannot be said that the present tax was aimed at copyrights. Appellant insists that it is, for the same reason as the tax held invalid in *Macallen Co.* v. *Massachusetts, supra*, in that amendments of the taxing act, sufficiently broad to include income from tax immune property in the measure of the tax, were specifically intended to accomplish that result. Reference is made to the legislative history of the statute. In *People ex rel. Standard Oil Company* v. *Law*, 237 N. Y. 142, it was held as a matter of statutory construction that the "entire net income" specified by the act then in force was gross income as defined by the applicable provisions of the federal income tax law, less specified deductions, and that consequently income from state and municipal bonds and some federal bonds was not included in the measure of the tax. After that decision subdivision 3 of § 208 was amended, Laws N. Y. 1924, c. 329, to include in the definition of income "all interest received from federal, state, municipal or other bonds"; and § 209 was amended, Laws N. Y. 1927, c. 479, so as to include in the measure of the tax "income from any source".

But the statute, before these amendments, was sufficiently broad to include income from copyrights within the measure of the tax; and neither before nor after the amendments did it make any mention of copyrights or their income. There is nothing to suggest that the legislature could at any time have had in mind the addition of income from copyrights to the measure of the tax, or that the statute or the amendments were adopted "for the very purpose of subjecting" it "*pro tanto* to the burden of the tax", which was declared to be the vice of the statute in *Macallen Co.* v. *Massachusetts, supra*, p. 631. That the royalties play some part in the measure of the tax is the result of the application of the general language of the statute to particular circumstances to which the statute makes no specific reference. In this respect, the present statute differs in no substantial way from that upheld in *Flint* v. *Stone Tracy Co., supra*.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 350.—October Term, 1930.

Educational Films Corporation of America, Appellant, *vs.* Hamilton Ward, Attorney General of the State of New York, and Thomas M. Lynch, et al., etc.	Appeal from the District Court of the United States for the Southern District of New York.

[January 12, 1931.]

Mr. Justice Sutherland, dissenting.

Mr. Justice Van Devanter, Mr. Justice Butler and myself entertain a different view.

The duty of this court to examine taxing acts to see that the use of federal tax exempt subjects as a measure for taxes imposed in terms upon taxable subjects is not a cloak, under which the former in substance and effect are taxed, was never more imperative than now, when, by reason of increased and increasing public expenditures, states and municipalities are driven to search in every direction for additional sources of revenue.

The self-evident operation of the provisions of the New York tax law is to cause the tax here in question to fall on an instrumentality of the United States. The statute necessarily exacts tribute from the income derived from that instrumentality. The amount of this tax is the same, and its effect, in every respect, is the same as though it had been imposed upon the income in precise terms. Were it not for *Flint* v. *Stone Tracy Co.* it would be difficult to suggest any reason for ignoring the rule so often laid down in the earlier cases, that the validity of the tax will depend not on what is named as the subject of the tax, but on its effect. *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625-627.

It is true that this court in the *Macallen* case did not overrule the *Flint* case, but it did characterize that case as "the extreme example" of the doctrine that a tax may be measured by income, although a part of such income is derived from nontaxable property. But the *Macallen* case definitely determined that such a tax

must be held to be invalid if the legislative purpose to lay the tax upon the nontaxable subject be "fairly inferable from a consideration of the history, the surrounding circumstances, or the statute itself considered in all its parts." In the present case, we are of opinion that the legislative purpose, though not as clear as it is in respect of income derived from federal bonds, is "fairly inferable" in respect of copyrights. And, although it may be conceded that a tax measured by income derived from copyrights does not impose a burden upon the exercise of a vital power of the federal government, as it would in the case of federal bonds, it is, nevertheless, a tax falling upon income which is exempt in virtue of an implied prohibition of the federal Constitution. *Long* v. *Rockwood*, 277 U. S. 142.

A former act of the state had been held not to reach certain federal bonds (*People ex rel. Standard Oil Co.* v. *Law*, 237 N. Y. 142, 149), and that act was amended so as to include "all interest received from federal, state, municipal or other bonds". The amendment by definite words thus clearly manifests the legislative purpose to include in the measure of the tax, income derived from federal bonds of every description, and thereby to disregard the exemption of federal instrumentalities from state taxation. So far then as federal bonds are concerned the case falls precisely within the test laid down in the *Macallen* case, and substantially within the facts of that case. The legislature, however, was not content with this, but later amended the taxing act so as to include in the measure of the tax "income from any source". The history of these amendments, successively broadening the terms of the statute, fairly justifies the inference that the aim of the legislature was to reach income from every source, including that derived from all varieties of nontaxable subjects, and, therefore, necessarily including copyrights and patents. That aim the state cannot make effective consistently with constitutional principles long respected and vital to the preservation of our dual system of government.

What was said by this court in *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, is peculiarly apposite. In that case a statute of Iowa provided that "Shares of stock of state and savings banks and loan and trust companies shall be assessed to such banks and loan and trust companies and not to individual stockholders." The statute was assailed on the ground that the tax, though in form

upon shares of stock, was in fact upon the property of the banks, etc., and invalid because the value of United States bonds which they owned were included in the valuation of the property assessed to them. The court, looking through the words of the act to its purpose and effect, sustained the contention of the banks. In deciding the question the court said (p. 509):

"It is conceded and cannot be disputed that these securities are beyond the taxing power of the State, and the only question, therefore, is whether in point of fact the State has taxed them. The first step useful in the solution of this question is to ascertain with precision the nature of the tax in controversy, and upon what property it was levied, and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the State. A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.' But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in *New Orleans* v. *Houston*, 119 U. S. 265, 278, and *Home Insurance Co.* v. *New York*, 134 U. S. 594, with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself."

And at page 521:

"If by the simple device of adopting the value of corporation shares as the measure of the taxation of the property of the corporation that property loses the immunities which the supreme law gives to it, then national securities may easily be taxed, whenever they are owned by a corporation, and the national credit has no defense against a serious wound."

That the principle, "an act may become unlawful when done to accomplish an unlawful end," applies to statutes imposing taxes is well established. *Federal Land Bank* v. *Crosland*, 261 U. S. 374, 378.

But wholly apart from extrinsic circumstances the statute itself in terms seems clearly to impose an income tax. The tax is not one *upon* the privilege of doing business, but it is an annual tax *for* the privilege of doing business, to be computed upon the basis of the net income for the year next preceding. The highest court of the state, in *People ex rel. Alpha P. C. Co.* v. *Knapp*, 230 N. Y.

48, 56-57, so held in an opinion by Judge Cardozo, from the reasoning of which it is hard to escape. After citing and discussing pertinent decisions of this court, he concludes:

"Tested by these precedents, the tax imposed upon this franchise must be held in practical operation to be a tax upon the income. Such, indeed, it would be in form as well as in substance, if the legislature had not stated (sec. 209) that the 'privilege of doing business' was the consideration for the payment. Nothing but that recital stands between the statute and conceded invalidity. How the legislature itself looked upon the substance of the burden is indicated by other provisions of the same and later statutes. The tax is to be in lieu of all other taxes on personal property or capital stock (Tax Law, sec. 219-J). It is to be in lieu of all other taxes upon income (sec. 350, subd. 7). There surely was no intention that all mercantile and manufacturing corporations, foreign and domestic, should in very truth be exempt from taxes upon property so fundamental in importance as capital and the fruits of capital. The reason for the apparent exemption was that, under the form of a tax upon the franchise, the property of such corporations had already been subjected to its share of public burdens.

"I think, therefore, that in substance, though not in form, in tendency, though not in name, this tax is equivalent to a tax upon relator's income."

There is nothing in the later case of *People ex rel. Bass, Ratcliff, etc.*, v. *Tax Comm.*, 232 N. Y. 42, which, in our opinion, challenges Judge Cardozo's cogent view. That case involved the question whether income which arose in part from property outside the State of New York could be constitutionally included in the basis for computing the tax. The court held it could, being "based on a comparison of the total assets with the assets in New York". The court quoted what Judge Cardozo had said in the preceding case, that " 'the tax imposed upon this franchise must be held in practical operation to be a tax upon the income . . . . This tax is equivalent to a tax upon relator's income' "; and then added, "it is primarily a tax levied for the privilege of doing business in the state". This amounts to nothing more than a repetition in brief of what Judge Cardozo, more at length, already had said, namely, that in practical operation the tax is one *upon* income *for* the privilege of doing business; and it leaves the conclusion set forth in the quotation we have made from the *Knapp* case wholly without modification.

These views, we submit, require a reversal of the judgment below.